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1322

No. 3906

1322

IN THE

**United States Circuit Court of Appeals**

**For the Ninth Circuit**

AKTIESELSKAPET BONHEUR (a corporation)

*Appellant,*

VS.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY  
(a corporation), claimant of the American  
Steamer "Beaver", her tackle, apparel, en-  
gines, boilers, furniture, etc.,

*Appellee.*

**BRIEF FOR APPELLANT.**

NATHAN H. FRANK,

IRVING H. FRANK,

*Proctors for Appellant.*

**FILED**

OCT 12 1922

**F. D. MONCKTON,**  
CLERK





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**BRIEF FOR APPELLANT.**

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This is an action by the owners of the motorship "Bayard" against the American steamship "Beaver" for damages for collision in the Bay of San Francisco.

Liability for the collision is admitted by the respondent, and the principal controversy arises upon the question of the amount of demurrage to be paid to said vessel for the loss of time during which she was undergoing repairs.

The vessel at the time was

"offered a lump sum of \$400,000 as charter hire  
\* \* \* for a voyage to the Orient and return,

and it is on this offer that libelant bases its claim for the amount of damage sought as demurrage.” (Opinion D. C., Rec. 304.)

The District Court, however, refused to allow any demurrage, and the reason given therefor is best stated in the opinion of the court as follows:

“But it is quite clear that a charter at that rate *would not have been approved by the Shipping Board*, which had fixed a basic rate of 45 s. per deadweight ton per month. While the ‘Bayard’ was laid up for repairs *the ‘Brazil’* was also idle in port, although there was a great demand for ships and she could have sailed at any time at the rates fixed by the Board. The fact that she did not do so leads me to the belief that the owners were unwilling to accept those rates, and preferred to wait in the hope or expectation of securing a more profitable figure. They were in fact unwilling to accede to the regulations of the Shipping Board with regard to rates, and seemingly desired to take their chances of getting higher rates later by leaving the ship idle during this period. *If it were not for the voluntary idleness of the ‘Brazil’* I would allow demurrage to the ‘Bayard’ at the rate of forty-five shillings per deadweight ton per month for the period of thirty-four days. But as the owners preferred to leave the ‘Brazil’ idle when she could have been chartered at those rates it is reasonable to conclude that they would not have accepted them for the ‘Bayard’ had she been in commission. A higher rate would not have been approved by the Board.” (Rec. pp. 304-305.)

This presents two questions for consideration on this appeal:

1. *Is the court warranted under the law applicable to such cases in finding that a higher rate than 45 shill-*



ings per deadweight ton per month "would not have been approved by the board"?

2. Is the court warranted in holding that because the managing owners of the "Brazil" (who were also the managing owners of the "Bayard") had allowed the "Brazil" to remain idle, that the owners of the "Bayard" were not entitled to recover?

It is our contention that under the rules of law for determining the question of demurrage in collision cases, the District Court was not warranted in either of the conclusions arrived at, and that the "Bayard" should, under the facts of this case, have been allowed demurrage upon the basis of her proposed charter of \$400,000.

The following well settled principles are controlling in the consideration of the facts of this cause:

1. Where the evidence of the loss is the best that the case affords, *justice requires all doubts to be resolved against the party in fault*, even though thereby libellant derives a greater benefit than mere indemnity.

2. The law implies consequential loss, and hence the *burden of proof that the Shipping Board would not have approved a charter for a lump sum of \$400,000 is on respondent, and must be clearly established.*

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## I.

### The Rule of Damages.

The rule governing in this case is laid down by the Supreme Court in the case of *Williamson v. Barrett*, 13 How. 111, 112.

This, we think, is the leading case upon the subject, and the principle there announced, so far as we are advised, has never since been abandoned. It is to the effect that

1. *The damages for detention are to be determined by the MARKET VALUE of the use of the vessel during the period of her detention. This REGARDLESS of the fact whether at the time of the collision she was, or was not, under charter.*

*If she were in fact under charter, her charter would tend to prove that market value. If she were not then under charter, then the demand in the market for vessels of that description and the price which the owner could or MIGHT have obtained for her hire, is the measure of compensation.*

Inasmuch as vessels are not necessarily employed under charter, but are quite as often employed by the owner in freighting for others, we supplement the above proposition with the further proposition that

*If it can be shown that there is a demand for freightage by vessels placed on the berth by the owner during the time of the detention, then the amount that the vessel could have earned by being placed in the berth, is also a measure of damage for such detention.*

In other words, using the language of the Supreme Court in the case above cited, though somewhat disassociated from the context, the rule in its simplest form is to

“look to the demand in the market for vessels of the description that has been disabled, and to the



price there, which the owner could obtain or *might have obtained* for her hire as the measure of compensation.”

We do not understand the respondents to controvert this rule, but they claim no employment could have been obtained for this vessel, because of the alleged interference of the Government, and that therefore there is no loss.

To this question we shall address ourselves when we come to consider the evidence in this case.

The part of the decision in *Williamson v. Barrett* to which we wish to call attention in this connection, is as follows:

After referring to the rule laid down by Dr. Lushington in the case of “*The Gazelle*”, which was a case in which the ship *was engaged in earning freight* at the time of the collision, and she therefore was allowed the gross freight she would then have earned, deducting so much as would in ordinary cases be disbursed on account of the ship’s expenses in earning it, the Supreme Court said:

“It is true, in that case, the ship was engaged in earning freight at the time of the collision; and the loss, therefore, more fixed and certain than *in the case where she is NOT AT THE TIME UNDER CHARTER-PARTY, and where her earnings must in some measure depend upon the contingency of obtaining for her employment. If, however, we look to the demand in the market for vessels of the description that has been disabled, and to the price there, which the owner could obtain or MIGHT have obtained* for her hire as the measure of compensation, all this uncertainty disappears. If there is no de-

mand for the employment, and of course, no hire to be obtained, no compensation for the detention during the repairs will be allowed, and no loss would be sustained.

But, if it can be shown that the vessel *might have been chartered* during the period of the repairs, it is impossible to deny that the owner has not lost, in consequence of the damage, the amount which she might have thus earned.

The *market price*, therefore, of the hire of the vessel applied as a test of the value of the service, will be, if not as certain as in the case where she is under a charter-party, at least, so certain that, for all *practical purposes in the administration of justice*, no substantial distinction can be made. It can be ascertained as readily and with as much precision as the price of any given commodity in the market; and affords as clear a rule for estimating the damages sustained on account of the loss of her service, as exists in the case of damage to any other description of personal property, of which the party has been deprived."

We think the foregoing is broad enough to cover every phase of the present case, whether we turn to the question as to whether or no the vessel *might have been chartered*, or whether or no the vessel *might have been placed in the berth* for hire. In either event it comes under the language of the decision,

"If, however, we look to the demand in the market for vessels of the description that has been disabled, and to the price there, which the owner could obtain, or *might have obtained* for her hire, as the measure of compensation,"

or extend somewhat the language of the court in the next paragraph,

"If it can be shown that the vessel *might have been chartered* during the period of the repairs"



[or might have been laid on the berth for the owner at profitable rates] "it is impossible to deny that the owner has not lost, in consequence of the damage, the amount which he might have thus earned."

Having before us the rule under which the damages are to be assessed, we have the next proposition, and the all-important one in the consideration of the present case,

2. WHAT IS THE NATURE OF THE EVIDENCE REQUIRED TO ESTABLISH THESE DAMAGES?

Upon this subject the law seems equally well settled. The rule is that

**"Where the evidence is the best the case affords, strict justice requires that the doubts be resolved against the party in fault. If the libelant derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification without exposing him to some loss or burden which the law will not place on him."**

This rule is *well settled*, and plays an important part in this case. It is because the lower court reversed the application of this rule, and resolved the doubts in favor, rather than against, the party in fault, that we think he has fallen into error.

In the case of *The Mason*, 249 Fed. 720, it is said:

"It is assuredly a settled general rule, though oftenest applied in collision, that a fault in one party, once firmly established, casts upon that party the burden of showing any contributing fault committed by his opponent. *The Persian*, 224 Fed. 441, 140 C. C. A. 135. The analogue of this rule is applicable to matters of damage, wherefore as

was stated in *The Mayflower*, 1 Brown's Adm. 376, Fed. Cas. No. 9345, affirmed as *The Dove*, 91 U. S. 381, 23 L. Ed. 354, the party in fault upon the merits of the case *must bear whatever inconvenience or hardship there may be in proving the exact amount of damages sustained*; and, if the party not in fault 'derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification without exposing him to some loss or burden which the law will not place upon him'."

See, also *The Margaret J. Sandford*, 37 Fed. 152.

*The Mayflower*, 1 Brown's Adm. 376, Fed. Cas. No. 9345 (Mich. 1872), referred to by the court in *The Mason* above, is an important case reviewing the whole question of damages for demurrage in collision cases. It went to the Supreme Court under title of *The Dove*, 91 U. S. 381, in which court, however, the question of damages does not seem to have been discussed. The case, however, is cited with approval by the Supreme Court as late as 166 U. S. 127-421, as well as by the Circuit Court of Appeals in the 249th Fed. 720, above. We may, therefore, safely rely upon it as of the highest authority.

In that case the vessel was sunk, raised, and repaired.

Before the collision she was employed by the libellant as one of a line of steamers carrying passengers and freight, and making daily trips from Detroit to Port Huron and back.

The respondents contended that the proper basis or measurement of damages for the delay, was the rental or charter value alone, and because it appeared that there was *no established rental* or charter value of such



a vessel, and further *does not appear that she could have been chartered* during the time of her detention, there was no basis for recovery of damages as demurrage.

The libelants contended, that there was no established rental or charter value, and because the libelants did not keep the vessel for hire, but for their own use in the business in which she was intended, and was then engaged, the value of such use to libelants in that particular business, is the proper basis and measure of such damages.

The respondent replied, that the proof of such value is based on probable profits of such service during the detention, and that such proof is excluded by express authority.

The authority relied upon for this proposition, was *Smith v. Condry*, 1 How. 28, and *Williamson v. Barrett*, 13 How. 101.

The court carefully reviewed these cases, and held that neither case sustained the proposition contended for.

In reviewing *Williamson v. Barrett*, the District Court said, of the effect of the evidence submitted in the case for his decision:

“I am free to admit, however, that the question is not free from difficulty, and some doubt, but *the evidence given being the best the case affords and being reasonably certain, I think strict justice requires that the party in fault should bear whatever inconvenience or hardships there may be arising out of the attendant difficulties and doubts.* Dr.

Lushington in the case of *The Gazelle*, 2 W. Rob. Adm. 281, 284, in remarking upon the general question, with great clearness and justice, said: 'The right against a wrong doer is for a *restitutio in integrum*, and this restitution he is bound to make without calling upon the party injured to assist him in any way whatsoever. If the settlement of the indemnification be attended with any difficulty (and in those cases difficulties must and will frequently occur), the party in fault must bear the inconvenience. He has no right to fix this inconvenience upon the injured party; and if that party derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification without exposing him to some loss or burden, which the law will not place upon him.' It is true this was said against a reduction of one-third new for old, as in insurance cases, in determining the amount due for repairs; but at page 284 the learned Doctor expressly applies the same doctrine to demurrage."

If it cannot be proved that profits would have been certainly made, it suffices if the fact is *proved circumstantially* and with a reasonable degree of certainty.

*The North Star*, 140 Fed. 263, Appeal 151 Fed. 168.

In the last named case, the collision occurred before the expiration of the charter under which she was operating, and while the vessel was on her last trip under said charter. Had the collision not occurred, the vessel would have been able to discharge her cargo under that charter, and could have returned to Duluth, Minn. taking on a cargo of grain, and returned within the period of navigation fixed by the underwriters.

The commissioner rejected a claim for damages for the loss of the use of the steamer and consort during that time, and the libelant excepted to the report. The court said:

“It will be observed that damages such as are here sought are recoverable only when the loss of profits is proved with reasonable certainty. The commissioner refused to make any allowance for the loss of use during the vessel’s delay, *because the evidence did not show that charters were offered the libelant, \* \* \* for the specific vessels detained by the collision.* The undisputed evidence, however, shows that the Siemens belonged to a class of vessels for which there was a demand, and that grain cargoes were available to vessels of her class after November 28, 1899; that libelant was offered charters from Duluth to Buffalo at the transportation rate of five cents per bushel; that two charters were accepted for certain of libelant’s vessels, and additional charters refused, owing to the condition of the Siemens.”

The court then states the law applicable to these facts, and cites cases, among them *Williamson v. Barrett*, the *Potomac*, the *Lagonda* and the *Margaret J. Sandford*, and quotes from *Williamson v. Barrett*, the phrase:

“But if it can be shown that the vessel might have been chartered during the period of the repairs, it is impossible to deny that the owner has not lost in consequence of the damage, the amount which she might have thus earned.”

He then applies the principle to the case in the following language:

“The facts show, not only that opportunity existed for using the Siemens and Holly to carry grain from Duluth to Buffalo, but that in all probability



freight would have been earned between December 2nd and the actual close of navigation, despite the early approach of the close of the season. Both vessels were prevented by the collision from making another trip during that season."

The court also takes up the proposition of other vessels belonging to the fleet which could have been substituted for this vessel, and says it is unimportant, and gives his reasons for that conclusion, in which connection he cites *The State of California*, 54 Fed. 404 (C. C. A. 9th Cir.), and says:

"The trend of authorities is to the effect that a tortfeasor must suffer whatever damages have been sustained without looking to the injured party for any assistance whatever."

He then quotes from *The Mayflower* the language referred to by us upon the same subject, and proceeds:

"This doctrine was cited with approval in *The Conqueror*, supra. (U. S. Sup. Ct.)

The case was appealed to the Circuit Court of Appeals, 151 Fed. 168, where the decree was modified upon the *question of fact*, but the law was not questioned.

So also in a case where a charter had been *offered but refused*.

*The Vanadis*, 250 Fed. 1010 (S. D. of N. Y. Apr. 8, 1918).

This was a claim for demurrage on detention of yacht, on proof of \$13,000 a month *having been offered for her for the season of 1914-15*, and that *such vessels were scarce and in demand at the time* and that her charter

value was \$11,000, assuming any damage for detention were properly allowable at all.

Collision took place on June 13, 1915, and the detention was during the month of July, 1915.

The period of detention was, roughly speaking, the month of July, 1915, which was *part of the season* in which vessels of her class were used.

In this case *The Conqueror*, 166 U. S. is referred to as establishing a contrary doctrine, and the court said:

“I must concede that some of the language in that case, broken from its context, lends itself to that conclusion, but the decision involved nothing of the kind. It turned upon the dubiousness of the proof of value of the yacht. \* \* \* I see no reason to think that, if the exchange value of the yacht’s use in *The Conqueror*, *supra*, had been established in the customary way, the libelant would have had further difficulty in his recovery.”

The basis of the decision is that though not intended for commercial hire, but only for use as a means of recreation or pleasure, such means are the subject of purchase and sale, and therefore have money value.

The point, however, that makes the case material to our present inquiry is the fact, that *the owner did not propose or intend to charter her*, but had *evidently refused the offered charter* and was using her for his own pleasure.

The decision recognized that pleasure is of commercial value, such value to be measured by the proof of a market through an offer that was made, *but not accepted*. The offer was for the season of 1914-15, but the detention

took place during July, 1915, at which time she was being used by libellant.

3. So, ALSO, THE LAW IMPLIES CONSEQUENTIAL LOSS.—Presumption of loss is in our favor, **so burden of proof that the shipping board would not allow her to charter, is on respondent, and unless clearly established, his defense fails.**

“If the owner of a horse, or a mill, or machinery, or a house, is temporarily deprived of his use of the property by the wrongful act of another, *the law implies consequential loss as a necessary and proximate result*, and allows a recovery for the value of its use as a proper item of damages, and permits the value to be shown by the opinion of witnesses conversant with the subject. (Citing cases.) In the large commercial ports the value of the hire of a vessel can as well be ascertained as that of most other kinds of property used for business purposes. As the question is one for the opinion of experts it is very likely to be involved in considerable contradiction of estimates, but this is an objection which applies wherever a question of market value or usable value arises. The injured party is not necessarily confined, in proving his consequential loss, to the amount of the market value of the use of his vessel during the time of detention. Even where the loss arises from breach of contract the rule is that the party injured is entitled to gains prevented, as well as losses sustained, provided they are certain, and such as might naturally be expected to follow the breach, (Citing cases.) and the rule in torts is *restitutio in integrum*.”

*The Margaret J. Sandford*, 37 Fed. 151-52.

We have, then, the following legal propositions applicable to the facts of this case:

1. *Damages are to be determined by the market value of the use of the vessel.*



*This value is to be determined by her charter, if at the time under charter; if not under charter, then the demand in the market for vessels of that description and the price which the owner could or MIGHT have obtained, is the measure of compensation.*

*If it can be shown that there is a demand for vessels placed on the berth, then the amount that the vessel could have earned by being placed on the berth, is also a measure of damage.*

2. *The evidence of damage need not be absolutely certain, but only reasonably certain.*

*Where the evidence is the best the case affords, strict justice requires that the doubts be resolved against the party in fault. If the libelant derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification without exposing him to some loss or burden, which the law will not place upon him.*

3. *The law implies consequential loss, and hence the burden of proving that the shipping board would not allow the proposed charter for a lump sum of \$400,000 is on respondent. Unless clearly established, his defense fails.*

With this state of the law in view, what is

## II.

### **The Evidence Which Will Determine the Amount of Our Demurrage?**

The vessel had just completed a voyage under charter to Mr. Moore, who had also had her for a trip previous

thereto, and who, at the time of the collision, had under submission to the owners an offer for a third trip under a lump sum charter of \$400,000, for a voyage to two points in the Philippines and return, the terms of which charter were to be the same as those of the previous charter.

The collision changed the conditions under which the vessel would be available. From that instant she was no longer available for service, and it was indefinite, not only as to when she would again become available, but also as to how she would at the end of that period be available, or under what conditions, or for what voyage—all due to the rapidly changing conditions directly or indirectly due to the war.

For this reason the negotiations were dropped. (Kutter, p. 109.)

However, we deem it immaterial, insofar as fixing her market value is concerned, that the charter was not entered into. Being an offer in good faith in a competitive market, for the use of the vessel by a party in whose employ she had been for a period of about six months just preceding the collision, the offer fixes definitely, and with more than "reasonable certainty," the market value of the use of the vessel at the time of the collision, and in the consideration of this question *the time of the collision, November 3rd, is the time when respondent's liability became fixed.* Any changes in conditions subsequent to that time, by reason of which that market became no longer available, are mere elements in the *loss of the market* consequent upon the collision. A subsequent fall in the market, or what is tantamount thereto, a *sub-*

*sequent refusal of the Shipping Board to approve a charter for the price named, cannot avail the respondent, provided that at that date such approval "could \* \* \* or might have (been) obtained."* (*Williamson v. Barrett*, ante.)

Neither is it necessary under the authorities above referred to, for libelant to prove with certainty that such approval could have been obtained. In fact he need not prove it at all, because the burden is on respondent to prove that we *could not* have obtained it. And if there be any doubt under the evidence as to whether we could, or could not, that doubt is to be resolved against the respondent.

In the language of the court in *The Mayflower*, where the court admitted that the question before him was not free from difficulty and doubt,

"But the evidence given being the best the case affords, and being reasonably certain, I think strict justice requires that the party in fault should bear whatever inconvenience or hardships there may be arising out of the attendant difficulties and doubts."

\* \* \* \* \*

"He has no right to fix this inconvenience upon the injured party; and if that party derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification without exposing him to some loss or burden, which the law will not impose upon him."

This language is particularly applicable to the evidence offered by the Shipping Board in view, *not only of the inconclusiveness of the testimony actually given, but*



also because of the refusal to permit an inspection of their records to determine for ourselves whether or no it contained pertinent matter, not considered by the witness, for arriving at a correct conclusion. This we contend for irrespective of any "reasons of State" suggested for withholding the evidence. Whether they be "reasons of State" or mere partisanship, it results in the same thing. Speaking for the libellant, the evidence controverting this special contention is "the best the case affords," and for the difficulty arising out of our inability to get at the evidence, even though due to "reasons of State," the "party at fault" must bear the consequence.

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#### CHARTERING COMMITTEE'S APPROVAL.

Now, let us take up the question with respect to the alleged inability of the vessel to go upon the proposed voyage because, as the court states, the Shipping Board would not approve the charter.

At the hearing we took the position, which we still take, that no testimony of any member of the Committee as to what *he would*, or *would not* have done, with respect to this charter, is material. In fact, *no member* of that committee could say *what the Committee as a body* would, or would not have done, *until the charter had been submitted to them, and a vote taken upon the proposition.*

In this, as we shall presently see, we are absolutely confirmed by the testimony of Mr. Smull.

If we are justified in this statement of the evidence, the defense necessarily falls to the ground, under the rules above set forth. Merely casting a doubt upon the matter will not serve for the defense. Nevertheless, we think it will satisfactorily appear that they have not succeeded even in casting a doubt.

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**CHARTERING COMMITTEE COULD NOT SAY IT WOULD  
APPROVE OR DISAPPROVE.**

To begin with, Mr. Page, a man of large experience on this coast, testifies, that, so far as his experience is concerned, the Government did not begin to interfere with the chartering of vessels until November 27th, notwithstanding his firm is, and for years has been, one of the largest chartering firms on this coast, and tried to keep in touch with all the business going on in the port. ( 29.)

He further testifies that there was no particular class of vessels that would, or would not, be approved, and no fixed rule about them. *It depended upon the discretion of the controlling board.* (p. 24.)

Not satisfied with Mr. Page's understanding of the state of affairs, the respondent took the testimony of Mr. Smull, a member of the controlling committee, and what do we find?

Mr. Smull directly *confirms* this statement of Mr. Page. *He would not affirm* that the charter in the case at bar if presented to the committee *would or would not* have been approved. He confines himself to testifying regarding *general principles* upon which the Board was supposed

to act, or purposes which the Board was seeking to accomplish, and the means they used to accomplish those purposes. For instance:

“We endeavored from the start to get all neutral boats on time charters to reputable American houses for round trips Pacific and round trips Atlantic.”

\* \* \* \* \*

“We did not favor the gross form of charter.”  
(p. 191.)

But when asked directly, concerning the charter under consideration in the case at bar (p. 192-93.)

“Q. \* \* \* Was the practice of the controlling committee at that time such that in any reasonable trade this offer would have been approved, if accepted by the owner.”

he answers:

“I don’t *think* it would, but I want to qualify that by the statement that *we never said as a committee what we would do until the charter was put before us.*

“Q. But in accordance with the practice that had been in vogue to that time would this in normal course of procedure have been *likely* to have met with the approval of the committee?

A. No: Our records show no approval of any Norwegian boat at that time.”

This, it will be observed, is a mere opinion of the witness as to what is “likely” based on *no record of approval*, and not a direct evidence of what the Board would have done. Taken in connection with his previous answer that “I don’t *think* it would,” with its significant qualification, it is mere argumentation, and far from persuasive at that. We shall presently see that his records *do not* support the conclusion.



On cross-examination, however, he is asked (p. 219-220.)

“Q. When any individual charter was presented to the Board, say up to November 3rd or along into November, was the individual charter scrutinized and individual judgment given upon it?

A. Yes, sir.

Q. There was no fixed rule applying to all charters that came in, was there?

A. Yes, sir.

Q. In what respect?

A. The charters as they came in were all placed before the secretary of the Board, who tried to ease our labors as much as possible by pointing out by ringed pencil marks the ports, loading ports, destinations, rates, charterers' names and such as that, when the charters came from his desk into the room of the committee, and *each charter from the inception of the Committee until today has been read and looked over by each member of the Committee*. When we go in session we sit around the table and examine each charter party, and then the charter parties are put in a pile before the chairman, and *then they are taken one by one and acted upon*. In cases where we have not the charter party, the full conditions of charter expressed in telegrams are acted upon, or in cases where there are letters presented, the charter party made in error, we act on the letter.

Q. What was the necessity of all that detail Mr. Smull, if there was a fixed rule applying to all charters?

A. You can't make a fixed rule on all charters. Every charter that comes in differs a little bit.

Q. That is what I apprehended; and *then as a matter of fact you have to pass an individual judgment on each charter?*

A. Yes, Sir.

Q. *Dependent upon various details with respect to the charter whether it would or would not be approved by the Committee?*

A. Yes, sir.

Q. *And until you had the particular charter before you you could not say whether you would or would not approve it?*

A. *With the qualification that if a wire was sent with the full details.*

Q. *Unless you had the wire with full details you could not say whether you would or would not?*

A. *No, sir.*

Q. *When was it that the Board finally decided that no neutrals could be chartered except to the Board?*

A. *I believe about March 18, 1918.*

Q. *Before that time the neutrals could charter to merchants without interference on the part of the Board?*

A. *Yes, subject to the charter party conditions made with our approval."*

So, also, with reference to the testimony of Page Bros. that the Board did not interfere until about the 27th day of November, the witness is asked (p. 222):

"Q. There is some testimony here of ship brokers out there—and I refer to Page Brothers, you know them?

A. They are not ship brokers, they are freight brokers.

Q. They were not interfered with until the 27th of November, you would not undertake to say that they were not right?

A. We never had a communication from Page Bros. for approvals.

Q. Their testimony with reference to ships they got freight for—what I am trying to get at is, you would not undertake to say their testimony so far as that was concerned was not correct, you personally have no recollection that would gainsay it?

A. No."

We might stop here, so far as concerns the contention that the charter would not have been approved by the Committee, because it conclusively appears that even the

committee-man does not know whether it would, or would not, have been approved. Therefore, under the rules of law above referred to, the finding of the District Court is not justified. But let us go further. We have more conclusive evidence upon the subject than this.

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**THE COMMITTEE'S RECORDS SHOW NO DISAPPROVALS  
DURING THE TIME IN QUESTION.**

It will be noticed that on the direct examination of this witness he is asked (p. 216.)

“Q. Did you say you had examined your records before you came, to see whether you had approved any lump sum charters the end of October or early in November?”

A. Yes, I went through our list of *approvals* up to about the first of the year, and from the time I went in there were no approvals of steamers under foreign flag round trip charters.

Q. Lump sum?

A. Lump sum gross form. The only approval was several of these boats in the East we had to get this way and we allowed a lump gross charter to get them here.”

It will be noticed that this testimony only applies to his approval sheet. Accordingly, on cross-examination he is asked (p. 224-225):

“Q. You have told us about looking through the records and not having found any lump sum charters during that period that were approved?”

A. Of neutral boats.

Q. Have you found any *that were denied*, any record of any *that were denied*?

A. *I simply looked through the approval sheets I had there.*”



It then appears that counsel for libelant had previously made application for permission to have *access to the records* to find out *from the records* what the situation was, which application was refused, applicant being referred to Mr. Campbell, in Washington. The witness is asked (Smull, p. 226-227):

“Q. Is there any reason why I could not have access to those records here and go over them personally? A. I don’t know.

Q. As a member of that Board I now make the request.

A. I will ask Mr. Campbell. I will get him on the phone when I get back and I will ask him, and if he says yes I will be pleased to send them over to you.”

\* \* \* \* \*

“Q. I want access to the records of the Chartering Committee to ascertain what the records show with respect to the chartering of vessels during this period from November 3 to December 21?

A. You mean as to approvals and disapprovals?

Q. Yes, as it appertains to the facts we have been examining about in this case?

A. I think that would show the whole thing, we have a sheet that shows approvals and disapprovals every day; the application either shows an approval or disapproval.”

That hearing, which took place on September 30, 1918, was adjourned for the purpose of permitting Mr. Smull to see if he can permit Mr. Frank to examine his records, subject to further cross-examination. (pp. 229, 237.)

The hearing was not resumed until October 16th (p. 237), and the communications between the Board and Mr. Campbell and Mr. Burling were then produced.

Mr. Campbell, in his telegram, stated that he had no objection to the Board showing Mr. Frank the list of approvals and disapprovals between November 3rd and *December 31st*, but that he *was not in position* to definitely *advise* whether they should let Mr. Frank *examine them generally*. Upon this question the Committee should exercise its own discretion, for reasons set forth in the telegram—concluding, however, that the Board should give him full information and exhibit to him all documents bearing on the “Bayard”-“Beaver” controversy. (p. 238.)

It appears, however, that the Chartering Committee, after holding a meeting, *refused* to give Mr. Frank that privilege, and this appears to have been approved by Mr. Burling.

It appears that Mr. Smull did not vote or participate in the meeting, but a wire was sent to the Shipping Board that the Chartering Committee had decided that

“the full records showing all approvals and disapprovals made on all business *from the first of the year* could *not* be shown to Mr. Frank.” (p. 246.)

Accordingly, *even the sheet of approvals and disapprovals* was withheld from inspection.

On this second hearing, however, Mr. Smull testified that he had made examination, and is asked (pp. 239-240):

“Q. Since then I understand you have also made examination and found no cases of *disapproval* of any such charters?

A. Yes, sir, between, as you requested, the dates of November 3rd and December 21st.

\* \* \* \* \*

Q. Is there any record of any lump sum charters *during the entire time mentioned*, either of approval or disapproval?

A. Not for round trip, no."

We had to be content with this statement of Mr. Smull that during the limited period, November 3rd to January 1st, the sheet showed *neither approval nor disapproval*. The fact that there were no *disapprovals* during this time is sufficient for our defense, inasmuch as that fact fails to support the contention of the respondents that the Chartering Committee *would not* have approved such a charter if presented. Nevertheless, it is far from complying with Mr. Griffith's suggestion (and in which we consider that he was sincere, that

"All I want to do is to *get at the truth* about this demurrage",

coupled with his statement that he

"is informed Mr. Smull will testify that the Committee and the Shipping Board *would not have approved* a lump sum charter any time between November 3rd and December 21st, 1917, *and before and after.*" pp. 124-125.

In view of this information, Mr. Griffith states that he is "scarcely puzzled by the testimony" of Mr. Page (p. 32), but we think he will now conclude that Mr. Page was right, because

**COMMITTEE APPROVED THE SAME KIND OF CHARTER AS  
HERE PROPOSED, AS LATE AS MARCH 22, 1918.**

The true significance of this limitation in the dates, and refusal to permit an inspection of the approval and



disapproval sheets, was not apparent to libelant's counsel at the time of the examination of the witness, and did not become apparent until, after his return to San Francisco, the charter of the Danish steamer "*Transvaal*" accidentally came to his notice. This is a charter dated *March 22, 1918* of a Danish vessel for a voyage from San Francisco to the Orient—China, Japan, Manila within certain limitations—and return either San Francisco or Seattle, for a lump sum of \$500,000, upon precisely the same form of charter party as was proposed in this case, and which was approved by the United States Shipping Board and the Inter-Allied Chartering Executive of London, and this, too, notwithstanding the testimony of Mr. Smull that about March 18, 1918, it was finally decided by the Board that no neutrals could be chartered to merchants, but must be chartered to the Shipping Board. (Record, pp. 252, 327.)

Under these conditions, it is fair to assume, that, after the first of the year, and subsequent thereto, there were other charters of this character approved by said Board.

It thus appears that there was *no rule* respecting that matter that would justify the conclusion that this charter *would not* have been approved *even so late as March 22, 1918*. Certainly if the Chartering Committee approves a charter of exactly the same character at that late date, it may reasonably be assumed that they would have approved the present charter. At any rate, no fair inference can be drawn that they would not have approved it. .

How, in the face of this evidence, can the court be justified in finding that the Shipping Board would *not* have approved this charter?

This ought to be conclusive.

But in addition to this, we have a large number of telegrams in the record between the Shipping Board and different parties proposing to charter certain vessels during the month of *December*, 1917, and among these vessels we find the "Bayard."

These telegrams confirm the conclusion that the Shipping Board would *not have interfered*, and in fact did actually authorize *a berthing* of the vessel.

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#### TELEGRAMS RE "BAYARD" AND "BRAZIL."

The first one is dated December 5, 1917 (p. 195), from the *American Asiatic Company, Inc.*, mentioning offers that Company made for the "Arabian" and the "Bayard."

The offer for the "Arabian" was.....\$170,000.00  
lump sum one way, Seattle to Japan, January sailing.

The offer for the "Bayard" was.....\$270,000.00  
one Pacific round San Francisco to Japan and return  
San Francisco \* \* \* stating also that the applicant  
must have two steamers to clear their congested freight,  
and are advised that the *owners* of these vessels will  
*not charter on government form time basis*, but *will*  
*place the same on berth themselves* for other ports if  
the Committee cannot approve the bids, and asking

*the help of the Committee to arrive at some agreement with the owners in order that they will not lose the steamers.*

Note that this was *not* a communication authorized by the owners of the "Bayard," but the communication of a *third party* seeking, through the Shipping Board to get the vessel.

We are, therefore, not bound by its statements, and entered our objection at the time (p. 195). But we fear the District Court was misled by the statements. Nevertheless, the correspondence shows the attitude of the Government, for it replied (p. 196) that they could not approve

the "Arabian" for .....	\$170,000.00
but will approve .....	\$130,000.00

The Committee also stated that a Japanese steamer *had been fixed the day before on that basis.*

This was an *approval for a lump sum charter on the "Arabian," a Danish vessel, outward bound, on December 5, 1917, and on the Japanese steamer on December 4, 1917, and shows that Mr. Smull's testimony that the Committee during that period had only approved lump sum charters inward, is erroneous, as is also his testimony that the "Arabian" was loaded in the East and not at an American port.* (p. 247).

At the same time the Shipping Board does *not* refuse the "Bayard" request, *but asks for information concerning her dead weight carrying capacity* (p. 196). This proves that there was no fixed rule



against such a charter, but, on the contrary, is a tacit admission that it was a subject for consideration.

They receive a reply, giving the dead weight 5300—cargo bale capacity 303,149 cubic feet.

To this the Committee replied on December 6, that they could not fix the vessel *at present*, but give no reason.

The next day, December 7, McNears, *referring to a message* from the Chartering Committee, telegraphs that *they* (McNears) were *offering* for the “Brazil” and “Bayard” 45 shillings on time charter, to which the Committee replied that they would approve, *but must have priority on homeward business.*

What is the significance of this correspondence? What was the message (which does not appear in the record) referred to by McNear, *as having been received from the Chartering Committee* the next day after the Committee had advised Asiatic that they could not fix the “Bayard” *at present*?

This charter, however, appears *not* to have been accepted by *the owner*, for on December 15, McNear again telegraphs with reference to the “Bayard” concerning wool which the Textile Alliance wished to ship from New Zealand to San Francisco, and requests the Board to give its approval for this instead of vessel returning by New Caledonia, which the Board said it would approve.

This, however, seems again *not* to have been agreeable *to the owners*, for on December 18, McNear, who

seems *desirous of obtaining control of the use of the vessel*, telegraphs that the agent of the owner had *fixed* full cargo bagged wheat and flour from Australian ports, adding that they (McNear) appreciated the owner's desire to control return cargoes, but *suggest* that the *Shipping Board should exercise its control* designating cargo that seems most urgent for the Government's requirements. (Ex. J. p. 202-203).

This is evidently an attempt to get the Government, *to interfere in favor of McNear*, as shown by the argument that follows in the telegram.

McNear, at the same time expresses his anxiety to see the vessels moving, and says he would appreciate it very much if the Board would do something to help the situation out.

This does not seem to have gone through, so on December 21 McNear asks for authority from the Board to  *cable the owners* that the Board has approved *berthing* the vessel, but maintain the privilege of maintaining priority of return cargo, asking if they might send that cable at once and proceed *booking* cargo *outward*; to which the Board replied that they *would* permit the outward cargo to be "booked subject to Carey's confirmation." "In other words cargo space will be divided among the several interests at your loading port and not given to any one party." (Ex. K. & L. pp. 204-205.)

On the 22nd of December, McNear wires the Board assuring them that all regular shippers would be given equal opportunity and equal rates on outward

cargo, with right of priority to the Government on return cargoes, and that they *have owner's authority for these voyages* (p. 207).

And on the 24th they wired the Committee that the *owners had signed the charter* awaiting the Committee's approval. (Ex. O. p. 207).

The Board was willing to accept this arrangement, but apparently received no word of approval from London (Telegram December 24, Ex. P. p. 208).

The witness then refers to other telegrams along the same line on getting Interallied approval, *which was finally granted* (p. 209).

*This correspondence is conclusive to the effect that not only was the Chartering Committee not refusing lump sum charters, but particularly indicates that they were also not refusing liberty to place the vessel UPON BERTH for owner's account, the only limitation in that case being that the Government should have preference on the return voyage with regard to the nature of the cargo to be carried, nothing said as to rates.*

The rest of the correspondence has reference to the "Brazil" which has no direct application to the present controversy, except in so far as it might show how the Board was handling the business at that time, and whether or no they were insisting upon time charters.

On December 6, they received a telegram from Grace & Co., who desired to obtain control of that vessel,



saying they had offered 45s. but the owners preferred waiting before chartering at that rate.

Nothing came of these inquiries.

It seems some misunderstanding on the part of the owners arose concerning the matter, and *McNear suggests* to Shipping Board that the owners be cabled recommending offer of time charter, *and telling them the Board disapproved berthing owner's account* (Ex. T. p. 214).

This resulted in *McNears getting the vessel for their account* on a time charter and placing her in berth for the voyage which the Shipping Board and the Interallied had already indicated their willingness to permit for owner's account, and on January 4, McNear cables that they are glad the efforts of the Board have been successful and that they (*McNear*) chartered the vessel *from the owners* on time charter terms as authorized by the Board and on our booking the cargo.

On January 7, the Controlling Committee advised McNear to take their approvals from Cook Shipping Board (meaning thereby the local San Francisco department.) (pp. 215-216.)

This correspondence is very illuminating with regard to the manner in which merchants and the Board dealt with each other in such matters. It, together with the granting of the charter of the "Transvaal" above referred to (approved March 22, 1918) proves absolutely that there was no rule controlling the approval of charters, but, as Mr. Page testified, it all "depended upon the discretion of the Chartering Board." (p. 24).

It proves further that there is no foundation for the claim that, because of any alleged policy of the Board, there can be any presumption that the Board would have denied approval, since, not only had they, during the period in controversy, approved lump sum charters for one way trips *both* to and from Asia to American Pacific Coast ports, but *they had also, as late as March 22, 1918, approved a lump sum charter for a greater amount on a Danish vessel ("Transvaal") for a round trip from an American port, under precisely the same form of charter proposed by Mr. Moore.*

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#### ATTITUDE OF THE BOARD IN THIS CASE.

Not only are the facts above adverted to illuminating regarding the attitude of the Board, but so, also, is the manner in which they deal with the testimony in this case.

We have already seen that they refused access to their records, without giving any sufficient reason for such refusal. The only suggestion of a reason for such refusal is found in Mr. Campbell's telegram of October 1, (p. 238), namely,

"If he (Mr. Frank) represents parties having or intending to present claims against United States or if your files contain information which should not be given publicity your Committee should exercise its own discretion as to permitting him to make general search of files,"

nevertheless, in the same telegram they are told that there is no objection to their showing list of approved

and disapproved charters between November 3 and December 31.

However, they did not see fit even to permit inspection of that part of the record concerning which Mr. Campbell said there was no objection. They just flat-footedly refused permission to see anything at all, except the papers that they themselves produced at the hearing, and they never attempted to find out whether or no Mr. Frank had any other cases such as indicated by Mr. Campbell.

That they were, however, sympathetic with the respondent's endeavor to hold down the amount of the recovery, is admitted by Mr. Smull.

So early as June 3, 1918, the entire case of the respondent was laid before them in a letter addressed to them by Mr. Campbell.

While it will be noted that respondents have been unable to prove any of the contentions set forth in said letter, the following statement in said letter, which is expressly adopted by Mr. Smull as indicating his attitude toward the case, is significant, namely (p. 242):

"It is of interest to the law division of the Shipping Board that such information be given the court, *because we desire to avoid the precedent of any judgments in the United States courts fixing heavy demurrage damages in collision cases. The Board is soon to be confronted with voluminous litigation in collision cases, and it is to its interest to have the demurrage rates kept down.*"

This Mr. Smull expressly admits also to be his attitude in the above matter (p. 244).

We are satisfied from the foregoing, that *there can be no reasonable inference* that the vessel would not have been permitted to sail either under a *lump sum charter* or *on berth for owner's account*, had application been made *in November*. Even if the matter be considered to have been left in doubt by the evidence under the rule so frequently referred to, "Strict justice requires that the party in fault should bear whatever inconvenience or hardships there may be arising out of the attendant difficulties and doubts."

Hence, *so far as interference by the Shipping Board is concerned, the finding should be for libelant*. There is no evidence sufficient to sustain the contrary finding upon which the judgment is based.

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#### THE "BRAZIL."

If the finding that the Shipping Board would not have approved the Moore—"Bayard" charter be error, which we think it is, then the question of *the idleness of the "Brazil"* becomes immaterial, because that has only to do with the question as to *whether or no* the owners of the "Bayard" would have accepted a charter which it is admitted the Shipping Board would have approved, namely, a charter at the rate of forty-five shillings per dead weight ton per month. In the language of the District court,

"If it were not for the voluntary idleness of the 'Brazil,' I would allow demurrage to the 'Bayard' at the rate of forty-five shillings per dead weight ton per month for the period of thir-



ty-four days. But as the owners preferred to leave the 'Brazil' idle when she could have been chartered at those rates, it is reasonable to conclude that they would not have accepted them for the 'Bayard' had she been in commission." (p. 305).

If, therefore, it be found that she *could have been chartered* to Mr. Moore for the lump sum of \$400,000 for the round trip, *there would be no occasion to consider whether or no the "Bayard" would have accepted* the rate of forty-five shillings per deadweight ton per month, that being merely an alternative proposition.

However, even with respect to the alternative proposition, no proper deductions can be made from the case of the "Brazil" and applied to the case of the "Bayard."

In the first place, it is to be noted that the "Brazil" did not arrive in the harbor until *ten days after* the collision, at which time all the conditions affecting the "Bayard" had changed.

Mr. Moore testifies:

"Q. Did you have any negotiations with them just prior to November 3 with respect to the chartering of the motorship 'Bayard'?"

A. I had chartered her for two trips previous to that, and I was trying to get her for a third trip and had negotiated quite a bit with the owners." (p. 18).

Again, speaking of these negotiations, Mr. Kutter says:

"A. They were handled through our office.

Q. Now, what was done with respect to them?

A. We cabled to our head office at Christiania, asking them to give us *a free hand* with the chartering of the boat.

Q. Before you received the reply, what happened?

A. The collision occurred.

Q. What did that do?

A. That stopped all negotiations'' (p. 109).

Moreover, there is no evidence of what was attempted with respect to the chartering of the "Brazil" except such as appears from the telegrams hereinbefore referred to between McNear and the Shipping Board, *which did not begin until December 7 (p. 198), more than a month after the collision, and only 14 days before the completion of the repairs on the "Bayard."*

It is impossible to say what would have been done with the "Bayard" had she been able to contract during that month preceding the negotiations with regard to the "Brazil." Under the rapidly changing conditions at that period of the war, no safe conclusion could be arrived at upon the subject based on the fact that at a later period the "Brazil" was allowed to lie idle.

Moreover, as already indicated, we are not bound by anything McNear was doing, nor by any statement made by him, or other third parties, regarding what the owners would do, in view of the fact that those statements are not only hearsay, but also were made in an attempt to *secure control of these vessels for themselves.*

Under these conditions, anything done with respect to the "Brazil" is entirely inapplicable to the situation of the "Bayard" on November 3, the date of the collision.

As already indicated, by reason of the collision, and from that date until December 27, the "Bayard" was undergoing repairs, and could not have entered into a contract of charter-party (p. 120).

Under the rules of law hereinbefore referred to, the deduction made by the court from the fact that the "Brazil" remained idle, is not warranted by the evidence. It is based upon a *presumption against the libellant*, and in favor of the respondent, with nothing to connect it with the "Bayard" save the fact that the two vessels had the same managing owner. And this, in the face of the fact that, *under the law, the presumption is against the respondent*.

It is further to be borne in mind, that the two vessels were not owned by the same owners, though they were in the hands of the same agents, or managing owners.

The owner of the "Bayard" is the Aktieselskapet Bonheur, a corporation organized under the laws of the Kingdom of Norway.

The owner of the "Brazil" is A. S. Gangerroff, a different corporation (p. 108).

It does not necessarily follow that because the managing owners are the same, that the two vessels would be handled in the same manner. The managing owners

are mere agents of the owners, and subject to their control.

We have already seen that, previous to the collision and up to the time the negotiations were broken off, there was no interference by the Shipping Board with such a charter as was proposed by Mr. Moore. In fact we have shown, and it is undisputed, that *precisely such a charter-party was approved by the Board as late as March 22, 1918.*

What was subsequently done in the way of charter, should not affect our right of recovery, because our rights are to be *measured by the conditions existing at the time of the accident.* As already said, *it was then the respondent's liability became fixed.* Any changes in conditions subsequent to that time, by reason of which the market became no longer available, are mere elements in the loss of the market *consequent upon the collision.*

A subsequent fall in the market, or, what is tantamount thereto, a subsequent refusal of the Shipping Board to approve a charter for the price named, cannot avail the respondent, providing that at *that date* such approval "*could \* \* \** or *might* have (been) obtained." *Williamson v. Barrett, ante.*

Had we in fact made the charter with Moore, and been detained so that we had lost that charter, we would have been entitled to recover, *in addition* to the amount lost during the period of repair, the amount lost during the balance of the term of the charter,



namely, the difference between the original and the substituted charter. It was so held in

*The Belgenland*, 36 Fed. 505-506.

THERE THE VESSEL WAS ON A VOYAGE TO A PORT OF DISCHARGE, AND WAS UNDER CHARTER. AFTER DISCHARGE SHE HAD A CHARTER TO PROCEED TO ANOTHER PORT AND LOAD BY A GIVEN DATE.

*The detention for repairs made her unable to reach that port on the given date*, and, as freights had fallen, the charterers cancelled the charter, as they had a right to do.

The steamer therefore went to a neighboring port for a similar cargo, and took the best freight she could get.

She was allowed to recover for the *difference between the two charters*. The time occupied in repairs, covering almost the entire time—35 of the 38 days which would have required her to perform the original charter, she was allowed this difference during the extra three days.

“If the existing charter is lost in consequence of the collision, and a charter at lower rates is necessarily taken for the residue of the charter period, the owner is entitled to compensation for this loss up to the expiration of the term of the original charter. He is entitled to this allowance, because he would not otherwise be indemnified for his actual loss, and because there is no legal rule which precludes the recovery of his actual loss in such a case. The loss of the larger rate is the immediate consequence of the collision, and, the rate being fixed by the existing contract, this item of damage is not subject to the objection of being

in the least uncertain, hypothetical, or speculative. The ship-owner is as plainly entitled to recover for such a loss as the cargo owner for the loss of the market through the delay of the ship by negligence, or through collision. See *The Guilio*, 34 Fed. 911, and cases there cited; the *J. Nixon*, 2 Fed. R. 259. Compensation for difference in charter rates was allowed the ship-owner in the case of *The Star of India*, 1 Prob. Div. 466, and *The Consett*, 5 Prob. Div. 229, which are quite like the present. No adjudications are cited to the contrary. See *The Lake*, 2 Wall, Jr. 52. The libellant is therefore entitled to compensation for the value of the use of the vessel during the 35 days' detention, computed upon the basis of her original charter rates, and *also* to the *difference in her earnings for the three following days.*"

We can see, therefore, no application of the fact that we subsequently chartered for 45 shillings on time charter, unless it be to *increase* our recovery by the allowance to us of the *difference between 45s. on time charter and \$400,000 on round trip charter* for the BALANCE OF THE TIME WE WOULD HAVE BEEN ON THE VOYAGE OVER AND ABOVE THE 48 DAYS OCCUPIED IN REPAIRS, VIZ.: 37 days—a very considerable sum, which we consider ourselves equitably entitled to, because we deem we *did* lose the Moore charter through the collision.

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**DEDUCTION OF TEN DAYS BECAUSE OF TIME NECESSARY TO  
COMMUNICATE WITH THE OWNERS.**

The District Court makes the suggestion that

“The period covered by the making of the repairs was forty-eight days. It would, however,

in any event, have taken at least two weeks to have arranged for the acceptance by the owners of a charter satisfactory to the Shipping Board" (p. 304).

For this reason the court fixes the time of demurrage at thirty-four days (p. 305).

This is not justified by the evidence.

It is true that Mr. Kutter testified that on account of cable interruptions it took all the way from one week to two weeks before they had a reply from Norway. But with respect to the negotiations with Moore he testifies.

"Q. Did you handle at your end these negotiations?

A. They were handled through our office.

Q. Now, what was done with respect to them?

A. We cabled our head office at Christiania asking them to give us a *free hand* with the chartering of the boat.

Q. Before you received the reply, what happened?

A. The collision occurred.

Q. What did that do?

A. That stopped all negotiations (p. 109).

From this it appears that the local agency had already applied for a "free hand" in making the charter. How long that was done before the collision, does not appear, but having already been done, it is certain under the testimony that they could expect an answer in less than ten days, and if the answer had been favorable, giving them a free hand, no further cabling would have been necessary, because then the

negotiations would have been by direct conference between the parties at the port of San Francisco.

We think, therefore, we have disposed of the suggestions of the defense by which they hope to deprive us of the market value of the use of the vessel during the period of repair, and we have only to figure the amount.

We shall place before the court the figures showing the different methods under which that amount can be arrived at.

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### III.

#### Amount of Demurrage.

There can be no doubt concerning the *market* value of this at that time.

The offer of \$400,000.00 fixes the market value. There is absolutely no evidence in the record to controvert it as being market value at that time.

The following is our way of figuring:

The expense of running the ship on the proposed round voyage, would be:

General expenses (Libelant's Ex. No. 2, Rec. p. 325).....	\$21,920.70
Crew stores, etc., including "fuel", \$260 per day (Rec. pp. 43-44). From this must be deducted the "fuel", which appears also in Ex. 2 above, as \$2344.46 for the round trip. This amount divided by 85 days, the length of the trip = \$27.57 per day. 260— 27.57 = 232.43 × 85 = .....	19,756.55

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Or total of expense..... \$41,677.25



Our figures then would be:

Gross market value for the vessel on the proposed voyage .....	\$400,000.00
Expense of earning the charter hire....	41,677.25

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Leaving a net earning of.....	\$358,322.75
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Time required to make the voyage  
“about 80 or 85 days—between 80 and  
90 days”. (Rec. p. 43.)

Taking the mean between the two—85  
days, we have  $358,322.75 - 85 = 4215.56$   
per day.

She was detained Nov. 3 to Dec. 21—48  
days, making a total demurrage of...\$202,346.88  
To this should be added the amount of  
the material damage..... 64,157.94

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Making a total of.....	\$266,504.82
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for which amount we claim judgment, with interest.

That the above market value of.....\$400,000.00  
is not excessive, is shown by the amounts paid for ves-  
sels under a *one way* charter, viz: \$345,000 (p. 27),  
\$400,000 (p. 28), \$500,000 (p. 28)—depending on the  
size of the vessel.

A round trip would be considerably more.

In this connection, it must also be borne in mind  
that Mr. Moore was bidding on the large measurement  
capacity of our ship. “I know her cubic; that is what  
I was interested in” (p. 20). That was 7500 tons (p.  
108).

**PLACING VESSEL IN BERTH FOR MEASUREMENT CARGO.**

Had the vessel been placed in berth, without charter, taking measurement cargo, on which basis Mr. Moore intended to place her in berth (p. 20), we have:

Measurement capacity 7500 tons (p. 108).

Outward rates allowed by Shipping

Board \$20 (Page & Smull).....\$150,000.00

Inward rates allowed by Board \$50..... 375,000.00

Total .....\$525,000.00

Cost of operation..... 41,677.25

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\$483,322.75

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which on an 85 day voyage, 5686.15 per

day, or for 48 days' demurrage.....\$272,935.20

to which should be added the material

damage ..... 64,157.78

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Making a total damage of.....\$337,092.98

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**PUTTING HER IN BERTH FOR DEADWEIGHT CARGO.**

Mr. Smull said her deadweight capacity was 4200 tons.

Mr. Smull was only approximating, or guessing, and that, too, by assuming that she was a coal burner. This vessel was an oil burner, which increased her deadweight capacity.

She had carried mixed cargoes of 4860 tons of copra, sugar and cocoanut oil (Rec. p. 114).

Copra was offering as high as.....\$80 per ton

Sugar ..... 40

Cocoanut Oil.....\$45 to 50 per ton

She had carried outward, 131,000 cases of Oil, market rate to 85 to 90 cts. a case. (Rec. p. 113.)

131,000 cases Oil—allowing the lowest  
figure, .85 = .....\$111,350.00

Inward

3047 tons Copra at \$80=.. 244,160

1610 “ Sugar at 40 = ... 64,400

203 tons Cocoanut Oil at

45 = ..... 9.135 317,695.00

---

\$428,945.00

Cost of operation..... 41,677.25

---

\$387,267.75

Which on 85 day voyage = 4556.09 per  
day, and for 48 days makes demur-

---

rage .....\$218,692.32

Adding material damage..... 64,157.94

---

Makes total .....\$282,850.26

So, it will be seen, we have adopted the  
most conservative method of figuring our  
demurrage consistent with justice, viz...\$202,346.88

As against what might  
quite fairly be claimed

either .....\$272,935.20

or .....218,692.32

Not to speak of the difference between  
our charter rate for a round voyage of.. 400,000.00  
compared with what other vessels were  
getting on the *homeward* voyage alone..

{ 345,000.00  
  { 400,000.00  
  { 500,000.00

There can be no question fairly made as to our  
claim of the market value of the use of that vessel dur-  
ing the period of detention, and under the law it is the  
market value that determines our recovery.

Mr. Smull computes the value of the use of the vessel per day on the basis of forty-five shillings per ton deadweight on time charter to be..\$1888.00 per day (p. 237).

---

**INTEREST IN COLLISION CASES.**

*In re Great Lakes Dredge & Dock Co.*, 250 Fed. 916:

“In collision cases, the allowance of interest on the award rests in the discretion of the court; but, where there are no special circumstances affecting the matter, the general rule should be applied.

In collision cases, the general rule is that interest on the damages eventually awarded should be computed from the date of the collision, or from the dates when payments for the necessary repairs were actually made.

In collision cases, interest on demurrage should be computed from the time the vessel returned to service.”

*The El Monte*, 252 Fed. 59 (5th Cir., June, 1918):

“As the party responsible for damages resulting from a collision became liable when it occurred, interest on the amount of such damages, if not then paid, was allowable from that date.”

---

**\$6023.75 EXPENDED FOR WATCHMAN AND CREW.**

There was a stipulation entered into between the parties with respect to certain items of damage (Rec. pp. 307-310).

This stipulation agreed that the physical  
damages amount to..... \$58,096.15



in addition to which, the libelants still

claim..... 6,023.75

for wages and keep of crew, etc., which sum was disallowed.

The items of this expense are set forth on page 309 of the Record.

We fail to understand upon what theory this was disallowed, and we respectfully insist that, to whatever decree this court shall determine the said libelant is entitled, the sum above mentioned be added.

---

#### CONCLUSION.

In conclusion, we respectfully contend that, inasmuch as the respondent admits liability for the collision, there can be no possible doubt that the respondent was in fault. Being in fault, every presumption is against the respondent, and the evidence that the Shipping Board would not have approved the Moore charter is not sufficient to overcome that presumption. On the contrary, the evidence indicates not only that the Shipping Board *did* allow a charter-party for a lump sum of \$500,000 under exactly the same terms, but it further had indicated its willingness to allow the vessel to go in berth for owner's account. So far as there is any evidence on the subject worthy of the name, that evidence is in favor of the libelant, and judgment in this case should go for the libelant for the amount of demurrage claimed, either upon the basis of the Moore charter, or upon the basis of

placing the vessel in berth, as indicated by the calculations presented to the court on page 46 hereof, together with interest.

Dated, San Francisco,

October 11, 1922.

Respectfully submitted,

NATHAN H. FRANK,

IRVING H. FRANK,

*Proctors for Appellant.*

No. 3906

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AKTIESELSKAPET BONHEUR (a corporation)

*Appellant,*

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY  
(a corporation), claimant of the American  
Steamer "Beaver", her tackle, apparel, en-  
gines, boilers, furniture, etc.,

*Appellee.*

BRIEF FOR APPELLEE.

FARNHAM P. GRIFFITHS,  
McCutchen, Olney, Willard, Mannon  
& Greene,

*Proctors for Appellee.*

FILED

OCT 23 1922

F. D. MONCKTON,





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No. 3906

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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AKTIESELSKAPET BONHEUR (a corporation)

*Appellant,*

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY  
(a corporation), claimant of the American  
Steamer "Beaver", her tackle, apparel, en-  
gines, boilers, furniture, etc.,

*Appellee.*

## BRIEF FOR APPELLEE.

---

### Statement of the Case.

The opinion of the District Court provides a succinct statement of the case and we quote it entire as follows (Ap. p. 303):

"The 'Bayard' and the 'Beaver' collided in the harbor of San Francisco on November 3d, 1917. The respondent 'Beaver' admits liability for the collision and the only question left for determination is the question of damages. The cost of repairs to the 'Bayard' must, of course, be allowed. The fact that other repairs, not necessitated by

the collision, were made, but which did not delay the completion of the repairs so necessitated is, as I view the case, immaterial. The period covered by the making of the repairs was forty-eight days. It would, however, in any event have taken at least two weeks to have arranged for the acceptance by the owners, of a charter satisfactory to the Shipping Board. The 'Brazil,' a ship of the same general type as the 'Bayard,' entered San Francisco harbor on November 13th, 1917, ten days after the collision, and remained there idle until the middle of January, 1918. During all of this time Olsen & Co. of Norway, were the managing owners of both the 'Bayard' and the 'Brazil.' Moore & Co. had offered a lump sum of \$400,000.00 as charter hire for the 'Bayard' for a voyage to the Orient and return, and it is on this offer that libellant bases its claim for the amount of damages sought as demurrage. But it is quite clear that a charter at that rate would not have been approved by the Shipping Board, which had fixed a basic rate of forty-five shillings per deadweight ton per month. While the 'Bayard' was laid up for repairs the 'Brazil' was also idle in port, although there was a great demand for ships and she could have sailed at any time at the rates fixed by the Board. The fact that she did not do so leads me to the belief that the owners were unwilling to accept those rates, and preferred to wait in the hope or expectation of securing a more profitable figure. They were in fact unwilling to accede to the regulations of the Shipping Board in regard to rates, and seemingly desired to take their chances of getting higher rates later by leaving the ship idle during this period. If it were not for the voluntary idleness of the 'Brazil' I would allow demurrage to the 'Bayard' at the rate of forty-five shillings per deadweight ton per month for the period of thirty-four days. But as the owners preferred to leave the 'Brazil' idle when she could have been



chartered at those rates, it is reasonable to conclude that they would not have accepted them for the 'Bayard' had she been in commission. A higher rate would not have been approved by the Board.

"A decree will be entered in favor of libelant for the amount expended in making the repairs rendered necessary by the collision. If the parties do not agree as to this amount, the cause will be referred to the Commissioner to ascertain and report the same."

Appellee, as claimant of the "Beaver", went into court admitting liability for the collision and consenting to pay the physical damages sustained by the "Bayard" as they might be agreed upon or proved, but contesting the demand for demurrage because claimant felt as the court below has found, that the "Bayard" would have been idle during the repair period, even if the collision had not occurred.

This finding was in accordance with claimant's contention in chief. Alternatively, and of course only in the event that the major contention should not have been sustained, claimant urged that in any case demurrage if awarded should be only for the then market value of the "Bayard", namely, her earning power at the basic rate prescribed by the United States Shipping Board as the *sine qua non* of its approval of the charters of neutral vessels at that time—it being admitted that without the Board's approval the "Bayard" could not have been chartered. Libelant was contending for demurrage based on a proposed \$400,000 charter—far in excess of the Board's maximum. The court has

found that "it is quite clear that a charter at that rate would not have been approved by the Shipping Board".

As the court further found that

"it would, however, in any event have taken at least two weeks to have arranged for the acceptance by the owners of a charter satisfactory to the Shipping Board"

the demurrage period whatever the rate per day of compensation for lost time (assuming any to be due) should as the court accordingly also found be for 34 instead of for the 48 days (full repair period) claimed by appellant.

We urged in argument below that, if, contrary to our first contention against any demurrage, some allowance therefor should be found due there should nevertheless be a deduction not only of 14 days (as above) but, under the authorities, an additional deduction because repairs not necessitated by the collision were carried on for owner's account concurrently with the repairs that *were* so necessitated. The court found the fact but deemed it immaterial "as I view the case"—that is, that no demurrage at all was recoverable.

So similarly a further contention we made in argument below became in the view the court took of the case (that *no* demurrage was recoverable) immaterial and naturally is not considered in the opinion. That was the contention that if demurrage should be given and should be based on the Moore charter (giving the vessel twice the value per day she would have at the Shipping Board rate) there should be a deduction for appellee's failure to use overtime or double shifts to shorten the repair period.

Appellee, as appears by its brief in this court (at pp. 2-3) clings to its original contentions that the "Bayard" would not have been idle and that the Shipping Board would have approved the charter on which appellee relies for its large claim of demurrage. That the approval was essential to any chartering of the vessel is not disputed.

The central issue, therefore, on this appeal, as the battle line is drawn by appellee itself, is whether the District Court was correct in its very clear findings that "a higher rate" (than 45 shillings per deadweight ton per month) "would not have been approved by the Board" and that appellee rather than take that rate would have kept the "Bayard" idle even if the collision had not occurred as "they were in fact unwilling to accede to the regulations of the Shipping Board in regard to rates" (Ap. p. 304).

To this central issue this brief, like that of appellee, is almost wholly devoted. Appellant excepts (Brief for Appellant pp. 48-49) to the District Court's disallowance of some six thousand dollars which it claimed in addition to the stipulated physical damages of \$58,096.15. In a few paragraphs toward the end of this brief we endeavor to show that the disallowance was correct. (The items are listed at page 309 of the Apostles and disallowed by the District Court in an order at page 311 and in the Final Decree at page 312.)

If, as we respectfully urge, this court affirms the District Court on the central issue of the appeal as above outlined, no demurrage will be recoverable and our contention below and the District Court's finding

that had any demurrage been due its limit would have been set by the Shipping Board's basic rate and its time 34 days only will not concern this court; nor will the other suggested deductions—for concurrence of owner's with collision repairs and for failure to use overtime or double shifts in connection with any demurrage based on the Moore charter.

We think it will be a convenience to the court to have the main body of the brief unburdened with these considerations (to a considerable extent calculations) which may prove immaterial. For convenience of reference we have placed them in an appendix.

Coming then to the principal issue our contention was and is that the libellant (appellant) is not entitled to any damages for demurrage because the "Bayard" would have been idle during November and December, 1917, (and thus during the repair period, November 3rd to December 21st, 1917) even if the collision had not occurred. The United States Shipping Board, vested with authority in that behalf, had prescribed that neutral vessels should not sail from American ports except with the approval of its Chartering Committee, and the Chartering Committee fixed a maximum basic rate for charters which, as the court below found, was for this period 45 shillings per deadweight ton per month. But rather than accept that rate this libellant, as the court further found, would have kept the "Bayard" idle.

During the very period in which the "Bayard" was laid up for repairs, her managing owners had another vessel in the harbor of San Francisco. This was the



“Brazil” referred to in the opinion of the District Court. She was a Norwegian motorship of the same general type as the “Bayard”. As the court states she

“entered San Francisco harbor on November 13th, 1917, ten days after the collision, and remained there idle until the middle of January, 1918 \* \* \* although there was a great demand for ships and she could have sailed at any time at the rates fixed by the Board” (Ap. p. 304).

But, recalling the term that became so familiar during the War, libellant wanted a profiteering charter for the “Bayard” and failing to receive the Board’s approval of it would have kept her idle as the “Brazil” was kept idle, at a time when moving ships above almost everything were thought by the United States and her allies to be the great necessity of the hour. We all know as the inner history of that period comes more and more to be recorded, how true to the situation that thought was. Having declined to accede to the regulations prescribed by our Government as a suitable war necessity, this neutral owner now asks our courts—the courts of the country it was to all intents and purposes defying—to give it the reward it would have reaped had it been able to make the defiance effective. Eventually, seeing the futility of their hope for larger prizes, the managing owners in January, 1918, accepted time charters for the “Brazil” and the “Bayard” (which had been idle since the completion of her repairs on December 21, 1917) at approved Shipping Board rates and the two vessels sailed about the 17th of January, 1918.

Reserving for the Appendix the considerations heretofore mentioned should they become material, we respectfully urge in the main argument that

I. The decision of the District Court that the "Bayard" was not entitled to demurrage because she would not have been employed during the period of repair even if she had been in commission should be affirmed.

II. The finding of the District Court upon certain disputed items of alleged damage not included in the stipulated physical damages should be affirmed (Ap. pp. 307-313).

Appellant and appellee will henceforward be referred to in this brief as libellant and respondent.

---

## I.

### The Argument.

**THE DECISION OF THE DISTRICT COURT THAT THE "BAYARD" WAS NOT ENTITLED TO DEMURRAGE BECAUSE SHE WOULD NOT HAVE BEEN EMPLOYED DURING THE PERIOD OF REPAIR EVEN IF SHE HAD BEEN IN COMMISSION SHOULD BE AFFIRMED.**

#### A. The rule re damages for demurrage: the authorities.

We agree with libellant that the rule is *restitutio in integrum* and that restitution includes demurrage, *but only* (this proviso, though well recognized in the authorities, libellant seems to overlook) *if the shipowner prove, not absolutely, we grant, but nevertheless with reasonable certainty, that but for the collision his vessel would have been employed and at the rate of hire on which his demurrage claim is computed.* That is his burden

of proof. It is not, as counsel suggests, for *us* to prove that the “Bayard” would *not* have sailed on her \$400,000.00 charter but for *him* to prove with reasonable certainty that she *would*—first that she would have sailed at all and, secondly, at a higher rate than the rate the government was approving.

We appreciate, as libelant contends, that in many cases, owing to difficulty of proof, the injured party may receive more than mere indemnification and that it is right that he should. The law takes care of that by requiring of him not absolute proof but proof to reasonable certainty that the vessel would probably have been employed and would probably have received the sum claimed as damages for demurrage. True, as

*The Mayflower*, Fed. Cas. No. 9345,

on which libelant relies, says “the certainty required is not absolute certainty but reasonable certainty”; but it is certainty and it is for libellant to prove it. We think a reading of this record leads to the conclusion reached by the District Court that the government of the United States would never have allowed the “Bayard” to sail under her \$400,000.00 charter and further that, failing to have that charter approved, her managing owners would have allowed the “Bayard” to lie idle as they did the “Brazil”.

# **1. The burden of proof is on libelant.**

One might have thought this almost self-evident and hardly requiring citation of authorities but for libelant’s contrary claim, evolved from a passing remark in an early federal case (*The Margaret J. Sanford*, 37 Fed.

151-52) that the law implies consequential loss. The case itself does not say the burden of proof is on respondent to show the vessel would not have been employed, and the United States Supreme Court has declared that the law is not so.

“In no event can more than the net profits be recovered by way of damages; *and the burden is upon the libellant to prove the extent of the damages actually sustained by him*” (Italics ours).

*The Potomac*, 15 Otto 630; 26 L. Ed. 1194.

“That the loss of profits or of the use of a vessel pending repairs, or other detention, arising from a collision, or other maritime tort, and commonly spoken of as demurrage, is a proper element of damage, is too well settled both in England and America to be open to question. It is equally well settled, however, that demurrage will only be allowed when profits have actually been, or may be reasonably supposed to have been, lost, *and the amount of such profits is proved with reasonable certainty*” (Italics ours).

*The Conqueror*, 166 U. S. 110; 41 L. Ed. 937.

So also Dr. Lushington said:

“It does not follow, as a matter of necessity, that anything is due for the detention of a vessel whilst under repair. Under some circumstances, undoubtedly, such a consequence will follow, as, for example, where a fishing voyage is lost, or where the vessel would have been beneficially employed. The *onus* of proving her loss rests with the plaintiff and this *onus* has not been discharged upon the present occasion.” (The *Clarence*, 3 W. Rob. 283.) (Italics ours.)

In

*The Loch Trool*, 150 Fed. 429,



the court said:

“That damages for the loss of the use of a vessel while undergoing repairs made necessary by a collision will only be allowed when it is shown that she could have been profitably employed during the period of her detention for such repairs is as well settled as any rule can become by repeated decisions of the courts. *The Conqueror*, 166 U. S. 110, 125, 17 Sup. Ct. 510, 41 L. Ed. 937; *The Potomac*, 105 U. S. 630, 26 L. Ed. 1194. *And the burden of proof is upon the libellant to show the amount of such damages*” (italics ours).

See also

*The North Star*, 140 Fed. 263; 151 Fed. 168,

so extensively referred to and, we may assume, approved by libellant, in which the Circuit Court of Appeals for the Second Circuit takes it for granted all through that it is for libellant to show its loss, not for respondent to negative it. In the light of these authorities the practically unsupported assertion of libellant that the burden of proof is with us fails; the burden is with libellant and, as we shall show presently, has not been sustained.

2. The proof required is a showing to reasonable certainty that the vessel but for the collision would have been employed and would have earned the profits claimed.

*It must be shown that the vessel would have been employed and would have earned the profits claimed.*

The law will not countenance an award of damages for demurrage to a shipowner who would not have used his vessel in any event. This is but another way of saying that the shipowner claiming redress on such account must show that he was damaged by the ves-

sel's idleness. A vessel injured in an icebound harbor cannot claim damages for the period she is being repaired because use of her would have been impossible in any event, nor can an owner who is on the point of laying up his vessel for the winter claim that a collision deprived him of her use. One who has determined to keep his vessel in harbor pending certain negotiations cannot claim that a collision prevented him from sending her to sea or that her idleness after a collision deprived him of her use since he did not intend to use her even if the collision had not occurred. In all of these instances the collision may have caused physical damage to the ship but the element of damage from loss of use is lacking.

In

*The North Star*, 140 Fed. 263; 151 Fed. 168,

one of a fleet of vessels employed in the transportation of grain on the Great Lakes was injured late in November and was laid up for repairs. It was shown that cargoes offered to the libelant's vessels were refused because of the approach of winter when navigation on the Great Lakes was impracticable, and that one by one the vessels were being laid up for the winter. Upon this showing the Commissioner disallowed libelant's claim for demurrage, basing his disallowance

“upon the improbability, in view of the evidence, that either of them would have been sent by their owner upon another voyage that season”.

The item was allowed in the District Court but upon appeal the Commissioner's ruling was sustained. Judge Wallace of the Circuit Court of Appeals, after ex-

plaining the rule upon the burden of proof in these cases, said:

“In ascertaining whether earnings have been lost by the owner, *the inquiry is not whether they could possibly have been made by the use of the vessel during the period for which he has been deprived of her use but is whether they would have been made.* \* \* \* It suffices if he shows a state of facts from which a court or jury can find that there was an opportunity for him to do so and that he would probably have availed himself of it. *But if it appears affirmatively, or if the reasonable inference from the facts established is, that there was no opportunity or that he would have refused the opportunity if offered it is impossible for a court or jury to find legitimately that he has sustained actual loss*” (italics ours).

Libelant says of *The North Star* that in the Circuit Court of Appeals “the decree was modified upon *the question of fact*, but the law was not questioned” (Brief p. 12). It goes without saying that libelant’s counsel did not intend this to be equivocal but it really is, as the court will perceive upon reading the two reports. The lower court allowed damages for demurrage upon the theory that the vessel belonged to a class of vessels in demand and for which grain cargoes were available. The upper court reversed the case because, conceding that grain cargoes were available for vessels of this class, the evidence showed that the libelant was refusing cargoes for its other vessels and laying them up, one by one, because of the approach of winter. Thus there was *no reasonable certainty* that libelant would have used the injured vessel. The court will observe that the extensive quotations from *The North Star* in libelant’s

brief (pp. 10-12) are from the opinion of the lower court.

The case of

*The Loch Trool*, 150 Fed. 429,

applies the same rule to facts quite similar to those in the case now before the court. Repairs upon the "Drum-craig" were made some months after the collision, twenty-four days being required for their completion. It appeared that during the period when the "Drum-craig" was lying idle after the collision another vessel *under the same management*\* and engaged in the same trade, was also lying idle. This was deemed a significant fact in concluding that the owners had shown no actual loss by the detention of the ship.

"Now in this case the libelant might have repaired its ship at once so that she would have been in condition to accept any employment offered her; but no effort was made to do so until two months after she was chartered and seven months after the collision. The most reasonable conclusion to be drawn from the fact of the long delay in commencing to make the repairs, *and the further fact, unexplained, that two vessels under the same management and engaged in the same trade were permitted to lie idle for five months after the collision, is that the Drum-craig would not have received profitable employment if she had been prepared to go to sea at an earlier date than that stipulated for in her charter of August 3, 1904*" (italics ours).

Similarly, in

*The Fannie Tuthill*, 17 Fed. 87,

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\*The "Brazil" which lay idle in San Francisco harbor during virtually the entire period of the "Bayard's" repairs was not only under the same management but actually under the same *managing ownership* as the "Bayard".



it was said:

“The right of the injured party to be indemnified for the loss of the use and service of his vessel during the period required for making his repairs is also recognized; but it should only include the minimum time required for that purpose, *and this should fall wholly within the season of navigation, or within which, but for the injury, his vessel could have been profitably used*” (italics ours).

In

*The Wm. M. Hoag*, 101 Fed. 846,

it appeared that the “Lurline” was at her dock undergoing repairs and that her owners had put another vessel in the “Lurline’s” route at the time the collision with the “Wm. M. Hoag” occurred. The only effect of the collision was to continue the “Undine” on the “Lurline’s” route until the latter vessel was completed; the owners then put the “Undine” on the dock for repairs. It was held that no demurrage was recoverable.

So in

*The Glencairn*, 78 Fed. 379,

the libelant’s vessel, the “Bedfordshire”, was injured in a collision in Astoria harbor for which the claimant admitted liability. Claim was made for damages on account of loss of time during the period of repair. The evidence showed that she was in the harbor for a month before the collision and had declined charters at the market rate. Her owners were holding her for a rate above the market. Judge Bellinger gave damages in the amount tendered by the respondent for the physical damages, and disallowed the claim for demurrage.

The conclusion to be drawn from these cases is, then, that it must appear not only that the shipowner could have used his ship during the period of detention but that he would have done so had she been free; and the fact that other vessels of the same kind and under the same management (and *a fortiori* is this true where there is the same managing ownership) were not in use during the period of detention is of importance in determining whether he could or would have used the vessel had she not been detained for repairs. The very striking application of this rule to the situation in the instant case (the idleness of the "Brazil" under the same management and managing ownership as the "Bayard") receives attention in the later pages of this brief.

*The proof that the vessel would have been employed and would have earned the profits claimed must be made by libelant with reasonable certainty.*

In libelant's brief the word might is suggestively italicized or capitalized wherever it occurs in the cases, the impression of counsel being it would seem that all that must appear is that *possibly* the vessel would have been employed but for the collision. That we submit is not the rule. The Circuit Court of Appeals for the Second Circuit said so not long ago in

*The Winfield S. Cahill*, 258 Fed. 318,

a case, by the way, strikingly similar in its facts to our case. Demurrage rate was demanded by the libelant according to a charter signed by the owner, but not approved by the governmental authorities of the United States and of the nations associated with it in the war

with Germany and with Austria. When it appeared that the charter not only had not been, but probably would not be, approved by those authorities, demurrage was refused altogether. *There was no reasonable probability that the vessel would have earned the charter hire.*

“We hold it established as matter of fact that there was not even a reasonable probability of the *Seguranca* earning any charter money under the charter in question, either when she was in collision or during the three-day period of her repairs. On this finding the law is not doubtful. *Damages for loss of use cannot be awarded because the injured vessel might have made some profit. The question is not of the possibility of employment, but of actual loss; not what possibly could have been made, but what would have been made.* The *North Star*, 151 Fed. 168, 80 C. C. A. 536” (italics ours).

*The Winfield S. Cahill*, supra.

And in *The North Star*, cited at the close of the foregoing excerpt, Circuit Judge Wallace said:

“In ascertaining whether earnings have been lost by the owner, *the inquiry is not whether they could possibly have been made by the use of the vessel during the period for which he has been deprived of her use, but is whether they would have been made*” (italics ours).

And he continued:

“As it cannot be proved that they would have been certainly made, except when the vessel has a pending engagement for her profitable use during the period of detention, it suffices if the fact is proved circumstantially and *with a reasonable degree of certainty.* The inquiry is determined by the same rules of law which obtain when the owner

of any other kind of property seeks compensation for the profits lost by the wrongful interruption of its use. The *Baltimore*, 8 Wall. 377, 385, 19 L. Ed. 463. It is necessary for him to show by direct evidence that he would have employed his vessel or his property during the period in such a way that earnings would have accrued to him. In many cases this would necessitate proving his intention at the time, and this might be impossible. It suffices if he shows a state of facts from which a court or jury can find that there was an opportunity for him to do so, and that he would probably have availed himself of it. *But if it appears affirmatively, or if the reasonable inference from the facts established is that there was no opportunity or that he would have rejected the opportunity, if offered, it is impossible for a court or jury to find legitimately that he has sustained actual loss*”\* (italics ours).

“Actual loss and reasonable proof of the amount” are the requirements of Dr. Lushington in

*The Clarence*, 3 W. Rob. 283.

“Reasonable certainty” are the words used by Mr. Justice Brown in

*The Conqueror*, 166 U. S. 110; 41 L. Ed. 937,

and by Judge Ross in

*The Tremont*, 161 Fed. 1, C. C. A. (Ninth Circuit).

“Not speculative and mere possible profits \* \* \* . Its source must be ascertained and its extent de-

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\*The last sentence is peculiarly pertinent to the “Bayard”-“Beaver” case because the reasonable inference from the evidence is that drawn by the District Court that the “Bayard’s” owners would not have had an opportunity to send her out under the \$400,000 charter and that they would have rejected, and indeed until well into January, 1918, did reject, the only opportunity which has been shown with reasonable certainty to have been available, viz.: chartering at the Shipping Board’s approved rate of forty-five shillings per dead weight ton per month.



financed and its realization must appear to have been reasonably certain",

is the rule in

*The Mayflower*, F. C. 9345,

to which libelant's brief makes considerable reference.

Furthermore, whatever the probable earnings are proved to be, some discount must be made in fixing the demurrage award. The reason for this is well explained in

*Roscoe on Damages in Maritime Collisions*, (1st ed.), p. 82:

"The earnings, whatever they may be, must also be discounted by a sum in respect of expenses saved as well as of risk not incurred, and wear and tear saved. To award as damages a sum for actual net earnings without any deduction in respect of the above-mentioned elements, would be akin to giving the interest arising from a speculative investment on a trustee security. In the one case, risks have to be run, contingencies and wear and tear of the machine incurred; in the other, there is no risk, and little or no wear and tear, for the ship is safely in port. As to the rate which should be deducted, it would be misleading to formulate any rules, varying as the facts necessarily must in every case."

- B. Libelant has not sustained its burden of proof to show with reasonable certainty that the "Bayard" would have been employed under the Moore charter but for the collision. On the contrary, the evidence is that she would have been idle during the repair period had the collision never occurred.**

Our points here are: (1) that the Government of the United States, under the ample justification of war

necessities, controlled all neutral vessels in American ports in November and December, 1917, exercising such control through the Shipping Board and the War Trade Board, and that no neutral vessel could sail from an American port without the approval of the Chartering Committee of the Shipping Board; (2) that a chief and commendable point and purpose of this salutary control was to reduce mounting charter rates and put a stop to profiteering in shipping; (3) that libelant has not shown with reasonable certainty as the rule requires (and therefore has not sustained its burden of proof) that the profiteering charter which it relies on to support its claim for damages would have been approved by the Chartering Committee—that apart from burden of proof the evidence is that that charter would have been disapproved,—further that libelant has not shown with reasonable certainty, or indeed at all, that the berthing of the vessel for owners' account (to which counsel incidentally refers, though we do not understand him to make claim for damages based thereon) would have been approved, the evidence again being that, apart from burden of proof, that plan would have been disapproved; (4) that the evidence shows that, not having approval of the Moore charter and not being permitted to berth the vessel for its own account, libelant would have allowed the "Bayard" to lie idle rather than sail her at rates which would have been approved and that, consequently, libelant has not sustained its burden of proof to show that its vessel would have been employed but for the collision,—that, moreover, apart from burden of proof, the evidence

is that regardless of the collision, the "Bayard" would have been idle during the period in question.

To these points in the order mentioned we now ask the court's attention.

1. **The Government of the United States, under the ample justification of war necessities, controlled all neutral vessels in American ports in November and December, 1917, exercising such control through the Shipping Board and the War Trade Board. No neutral vessel could sail from an American port without the approval of the Chartering Committee of the Shipping Board.**

The Chartering Committee of the United States Shipping Board was composed of three members, Welding Ring, J. B. Smull (now President of the United States Shipping Board Emergency Fleet Corporation) and Lieutenant-Commander Daniel Bacon. Ring was appointed September 15, 1917, (Ap. p. 217), Smull on October 1, 1917 (Ap. p. 187), and Bacon about October 3, 1917 (Ap. p. 217). Commander Bacon resigned the latter part of November, 1917, and his place was filled by A. C. Fetterolf (Ap. p. 187). At first the Committee endeavored to handle the whole work as a Committee, but by the time Mr. Fetterolf took office, Mr. Ring was in charge of the sailing vessels, particularly those on the Pacific Coast (Ap. p. 188), Mr. Smull had taken control of steamers and steamer chartering so that the "Bayard" would belong to his province and Mr. Fetteroff was assigned the eastern sailing vessels (Ap. p. 188).

Instructions concerning their duties were received directly, first by word of mouth, then by letter, from

Mr. Hurley, Chairman of the United States Shipping Board (Ap. p. 189). From the testimony of Mr. Smull their general instructions were as follows (Ap. p. 189):

“We were to have supervision of all charter parties carrying goods to and from this country in vessels under all flags, the charter parties were not to be approved until all the conditions of the charter party met with the approval of the Chartering Committee. In addition to this we were to have the approvals of all voyages where no charter party existed. For instance, a man would load his vessel and before that vessel could sail he would have to have the approval of the Chartering Committee for that voyage. This gave us direct control over all the shipments from this country to foreign countries.”

For the enforcement of the policies agreed upon, the War Trade Board and the Chartering Committee worked together. This appears from the deposition of Mr. Smull (Ap. p. 190):

“Q. Were you working in connection with the War Trade Board from the beginning? A. From the first day that we took charge we were working with the War Trade Board in the matter of their granting all the licenses for bunkers and stores on steamers and sailing vessels.

Q. What was the practice between your Board and the War Trade Board as to the issuance of bunker licenses? A. From the start until today it has been the rule of the War Trade Board not to grant a bunker license to a sailing vessel or a steamer or motorship to a foreign port unless their records show that the charter party on the voyage has been approved by the Chartering Committee.”



The Bureau of Transportation antedated the Chartering Committee by some months, for it was in active operation (though under another name) since June 15, 1917 (Ap. p. 175). Mr. Smull's description of the co-operation between the Chartering Committee and the War Trade Board is corroborated by the testimony of Mr. Richards of the Bureau of Transportation, a branch of the War Trade Board.

“Q. What was the practice of the War Trade Board at that time in regard to granting and refusing bunker licenses to ships before the charters of the ships for which applications for bunkers were made had been approved by the Chartering Committee? A. If we knew the Chartering Committee had disapproved of a charter or voyage we would be very largely influenced by such disapproval and only grant bunker licenses if there was a particular reason developed subsequently why such licenses would be granted.

Q. State whether or not you would grant or refuse bunker licenses to such ships before the charter had been approved. A. There were instances where licenses were granted through our being unaware of any action having been taken by the Chartering Committee. It has been a matter of development and growth. Our aim from the first has been to co-operate with them and perfect our working together *so that no vessel could leave without first having the charter and voyage approved by the Chartering Committee, unless there were very strong reasons which we would have to take into consideration in some particular instances.*

Q. How early did the practice start? A. From the very formation of the Chartering Committee” (Ap. pp. 170, 171).

“We, from the very first, attempted to secure daily advices from them of all approvals and disap-

provals, which information was placed on our files, so that when an application came before us, if we had any record of any action by the Chartering Committee, such information was seen by us" (Ap. p. 178).

The "Bayard", it may be remarked, belonged to a class of vessels which the local agents of the War Trade Board in San Francisco were not empowered to license, but were instructed to refer to Washington before granting clearance papers (Ap. pp. 176-177).

The term "bunker licenses", as it was used in the foregoing passages, was explained in more detail by Mr. Cory, Assistant Agent of the War Trade Board at San Francisco, to mean fuel oil or fuel coal, food stores, engine stores and all other supplies taken on board the steamer (Ap. p. 51).

The Chartering Committee lost no time in getting to work. The members realized from the start that the task was large, but all of them were experienced men and they knew the ends to which they must work. Mr. Smull testified on cross-examination:

"Q. Of course, when you first came together it was necessary for you to organize and to work out some theory, wasn't it? A. Yes.

Q. It took you some time to do that before you settled down? A. No, sir.

Q. It did not? A. No, sir.

Q. Had you worked out all your plans before November? A. The plans that we laid out were the scrutinizing of all charter parties, the rates and conditions of charter, and then followed in a few days the establishment of maximum rates. *That was the first thing we did, that we took up immediately and established maximum rates on time*

*charters*, and maximum rates on coal, and maximum rates on nitrates, etc.” (Ap. pp. 217-218).

The method of examination of charters was described by Mr. Smull as follows:

“Q. When any individual charter was presented to the Board, say up to November 3rd or along into November, was the individual charter scrutinized and individual judgment given upon it? A. Yes, sir.

Q. There was no fixed rule applying to all charters that came in, was there? A. Yes, sir.

Q. In what respect? A. The charters as they came in were all placed before the secretary of the Board who tried to ease our labors as much as possible by pointing out by ringed pencil marks the ports, loading ports, destinations, rates, charterer's names, and such as that; then the charters came from his desk to the room of the Committee, and each charter from the inception of the Committee until today has been read and looked over by each member of the Committee. When we go into session we sit around the table and examine each charter party and then the charter parties are put in a pile for the chairman and then they are taken one by one and acted upon. In cases where we have not the charter party the full conditions of charter expressed in telegrams are acted upon, or in cases where there are letters presented, the charter party made in error, we act on the letter” (Ap. p. 219).

This is the testimony of Mr. Smull showing the methods in use at headquarters in New York City. From this side of the continent we have evidence of the effective control of this Committee from those who co-operated in carrying out its policies and from those who were obliged to conform to them.

Mr. Cory, of the Bureau of Transportation of the local War Trade Board in San Francisco, testified as follows:

“Q. What, describing them briefly, are the functions of the Bureau of Transportation of the War Trade Board? A. The functions are to license, to control operation of the vessels, of all vessels of any country going out of the port, of any port in the United States, going foreign, in such a way as to regulate the use of them to the best advantage of the United States during the war” (Ap. p. 50).

\* \* \*

Q. Was it necessary on November 3, 1917, that a neutral vessel, a Norwegian neutral vessel, should have a permit from the War Trade Board in order to get bunkers? A. Yes.

Q. How would that permit be secured? A. Usually the broker that handles the vessel files a formal application with the War Trade Board or the branch—that is usually filed at the branch office but in some cases it is filed by the owners in Washington and New York and the branch office is advised accordingly to issue the license or withhold the license depending upon whether or not the application is approved or disapproved.

Q. Would an agreement be exacted from the owners or their representatives in order to secure bunkers after the application? A. Several agreements would be exacted” (Ap. pp. 50-51).

But this license was not granted as a matter of course upon the application for bunkers. On cross-examination it was suggested that it was so granted. Mr. Cory's answer was as follows:

“No, the fact that that agreement was signed was not necessarily an agreement that he would get a license. If the Shipping Board or Chartering Committee did not approve that voyage, or if the War Trade Board did not approve the voyage,



did not approve the character of the return cargo he would not get it" (Ap. p. 61).

The San Francisco agent of the owners of the "Bayard" knew perfectly well that the approval of the Chartering Committee was necessary for the charter which was offered to the "Bayard" just prior to the collision. He testified as follows: (Ap. p. 114).

"Q. Was the Government interfering in anywise with the 'Bayard' at that time? A. No, *other than the charter would have to be submitted for approval; that is all.*

Q. If you put her on dock she would not have to submit anything for approval? A. *The same procedure would have to be gone through, subject to approval of the Shipping Board.*" (Italics ours.)

Then counsel gave his witness opportunity to modify his previous answer by asking:

"Q. If you put her on the dock?"

To which the witness replied:

"A. On the berth, at the time they were not interfering very much, when it first started" (Ap. p. 114).

"Q. You proposed to submit this particular charter with Mr. Moore to the Shipping Board, didn't you? A. We did.

Q. And you understood that you would have to have the approval of the Shipping Board of that charter before the vessel could sail? A. That was the general understanding that all the charters were to be submitted to the Shipping Board for their approval" (Ap. pp. 121-122).

Libelant's witness, Mr. Arthur Page, confirmed the testimony that the Chartering Committee at headquarters exercised direct control over all approval of charters.

“Q. Let us have this clearly understood: These approvals of charters were not done here by the local office of the Shipping Board at all were they? A. No.

Q. So all the talk about the disorganization here had nothing to do with that feature of the situation? A. No.

Q. The approval was submitted to the Shipping Board at Washington? A. Yes.

Q. Was approved there by the Chartering Committee or disapproved? A. Yes.

Q. And the local board here as soon as there were fixed rules they had the administration of them did they not? A. The approval always came from over there by telegraph” (Ap. p. 37).

Libelant’s witness, Mr. Moore, also testified on cross-examination that he expected to submit to the Shipping Board his offer to charter the “Bayard” (Ap. pp. 19-20).

For further evidence of the control exercised by the United States Government over neutral ships in American ports we refer the court to the agreements signed by the agents of the “Brazil’s” and “Bayard’s” owners in San Francisco when the ships finally sailed (Ap. pp. 66-107). These agreements which for some months had to be made by all owners of neutral ships comprised, among other things, a guarantee given to the Collector of Customs that the ship would proceed upon the given voyage, would return directly to the United States and on return discharge all her cargo in ports of the United States; second, an application, directed to the Bureau of Export Licenses, for a bunker license; third, an application to the Collector of Customs, for a license for ship’s stores, “per attached list”. The

licenses named the ship and described the voyage upon which she was about to depart.

We have set out in detail the organization of the governmental agencies, established weeks before this collision, which sought to control all vessels in American harbors. The effectiveness of their control was recently recognized by the Circuit Court of Appeals of the Second Circuit in a case involving demurrage.

In

*The Winfield S. Cahill*, 258 Fed. 318,

damages were awarded to the "Seguranca" by the District Court for three days' loss of time while undergoing repairs caused by a collision. At the time of the collision, the "Seguranca" was under charter. *But this charter had not been approved by the necessary governmental agencies, and it further appeared that the vessel would never have been allowed to get a cargo as she had been "black-listed"*. The District Court allowed the demurrage claim but on appeal the award was reversed, all demurrage claims being refused on the ground that the libelant had failed to prove even a reasonable probability that the charter hire would have been earned.

2. A chief and commendable point and purpose of the salutary control which the Chartering Committee of the Shipping Board was exercising over neutral vessels was to reduce mounting charter rates and put a stop to profiteering in shipping.

The Chartering Committtee had in view various objects. Control over the shipment of essentials and the prosecution of voyages for essential purposes was

one (Ap. pp. 171, 189, 190, 192, 50, 51). Addition to the trade of the United States and, in those anxious times when so much depended on shipping, the retention of as many neutral ships as possible in that trade was another (Ap. p. 194).

But to no object did the Chartering Committee give more earnest attention than the praiseworthy program of putting a stop to profiteering in freight rates. Mr. Smull testifies:

“Q. Were there any particular abuses which were designed to be corrected by the appointment of this Chartering Committee? A. I don’t know whether you can call it abuses.

Q. Practices? A. The chief practice the Government did not like was the continual advancement of freight rates to leave this country.

Q. One of the objects was to obtain a leveling of those rates downward, to have it uniform? A. There was not any discussion about it but that was what I always understood, that was the worst feature” (Ap. p. 229).

The establishment of maximum rates was indeed one of the first things undertaken by the Committee upon its organization. This was very soon after the first of October.

“The plans that we laid out were the scrutinizing of all charter parties, the rates and condition of charter and then followed in a few days the establishment of maximum rates. *That was the first thing we did, that we took up immediately, and established maximum rates on time charters, and maximum rates on coal and maximum rates on nitrates, etc.*” (Ap. p. 218).

Happily, success attended this effort to end profiteering in freight rates. The time charter rate was reduced



from sixty to thirty-five shillings, and this in the course of a few months (Ap. pp. 33, 217, 245). Of course, standardizing the time charter rate affected the freight rates to the shipper. Libelant's witness, Mr. Page, admitted this when he said "the freights, before they were interfered with, were very high, and they would very likely have gone higher" (Ap. p. 26).

3. Libelant has not shown with reasonable certainty as the rule requires (and therefore has not sustained its burden of proof) that the charter which it relies on to support its claim for damages would have been approved by the Chartering Committee—and apart from burden of proof the evidence is that that charter would have been disapproved. Nor has libelant shown with reasonable certainty, or indeed at all, that the berthing of the vessel for owner's account, to which counsel incidentally refers though he makes no claim for damages based thereon, would have been approved, the evidence again being that, apart from burden of proof, that plan would have been disapproved.

(a) *The reason for a basic rate in terms of tonnage and time.*

Libelant bases its claim for damages for demurrage on the offer of the so-called Moore charter. This was a lump sum or gross form charter for \$400,000.00 for a round trip from San Francisco to two or more ports in the Philippines and return. Libelant has not shown with reasonable certainty—indeed has not shown at all—that that charter would have received the required approval of the Shipping Board. Therefore

libelant has not sustained its burden of proof. But aside from the burden of proof, the evidence is positively that that charter would have been *disapproved*. And why? Because that charter rate was at least double the maximum basic rate which the Shipping Board was allowing. We have pointed out in earlier pages of this brief that a foremost object in the Shipping Board's program was to reduce freight rates. To do this, of course, it had to reduce charter rates, as otherwise the necessary margin of profit would not be preserved for the charterer. The simple plan for this, and the one in fact adopted by the Chartering Committee of the Shipping Board, was to fix a basic rate. And obviously the only basic rate capable of practical administration was one expressed in terms of tonnage—that is to say, an allowance of a designated charter hire of so much per ton of the ship's capacity. Such a basic rate could be applied to all ships regardless of their size. But that also normally involved insisting on the time charter as against the lump sum charter. For the basic rate, to be applied as a practicable plan, had to be expressed, not only in terms of *tonnage*, but also obviously in terms of *time*—so much per ton per month. A brief inspection would readily reveal to the Shipping Board in normal cases whether a particular charter conformed to this basic rate. The plan eliminated inquiry into the tonnage of the vessel or the length of her proposed voyage. Whatever the tonnage and whatever the time element, the *rate* was so much per ton (45 shillings for the period here under consideration) per month. On the contrary, there could be no basic rate for lump sum charters *per se*—

that is for charters where a lump sum was paid by the charterer to the owner of a vessel for a designated voyage because ships are of different tonnage and bound on voyages of different periods, and these two elements of size and time would always be disturbing factors. On the other hand, if the Shipping Board (not finding practicable a basic rate for lump sum charters *per se*) were nevertheless to approve and sanction lump sum charters generally, it would in every instance be put to the necessity of computing the lump sum rate over into terms of time charter tonnage rates. In other words, it would in every instance have to look up the tonnage of the vessel and figure the probable length of the proposed voyage and then reduce the lump sum rate into terms of tonnage per month; that is to say, to satisfy itself that the lump sum rate was the equivalent of the time charter rate; whereas, in the case of a time charter, all the Committee normally had to do was to see whether the rate per ton per month was the basic rate without inquiry into the ship's tonnage or length of voyage, which would be immaterial.

Accordingly, the Chartering Committee of the Shipping Board prescribed and approved time charters and disapproved lump sum charters with the exception that in rare instances (and we believe the only one in this record is the "Arabien", for the case of the "Transvaal" is immaterial, being months later than the period here under inquiry\*) it would resolve lump sum rates into terms of tonnage and time and, if when resolved they conformed to the basic rate, give their approval.

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\*These cases are considered in later pages of this brief.

The Moore charter on the "Bayard" could not possibly have been approved under this rarely recognized exception, for it figures out at more than twice the basic rate.

With the foregoing by way of preface, we propose to examine the evidence and show that

- (b) *Libelant has not sustained its burden of proof to show with reasonable certainty or at all that the Moore charter would have been approved, and the evidence apart from burden of proof is that it would not have been approved.*

The evidence in this connection is: first, that for the period in question the basic rate was 45 shillings per deadweight ton per month, time charter, and that this rate constituted a fixed rule of the Committee subject to no variance and insisted upon for all charters; second, that the Chartering Committee normally disapproved lump sum charters; third, that the only cases where the Committee approved lump sum charters for neutral vessels were those (a) where, the vessel being in a foreign port beyond the Committee's control, it had to approve in order to get her into an American port and there subject to the control of the Committee and (b) where, taking into account the tonnage of the vessel and the length of the proposed voyage, the lump sum rate really equalled only the basic rate of 45 shillings per deadweight ton per month; fourth, that the proposed \$400,000.00 lump sum Moore charter amounted to more than twice the basic rate and could not possibly have been approved.



Reviewing the evidence on these points, we observe

First. For the period in question the basic rate was 45 shillings per deadweight ton per month, time charter, and this rate constituted a fixed rule of the committee subject to no variance and insisted upon for all charters.

Mr. Smull, the Chairman of the Chartering Committee of the Shipping Board, testified:

“Q. One of your first determinations was fixing approximately what you considered a fair rate on these Pacific vessels of 45 shillings per ton deadweight on time charter? A. Yes” (Ap. p. 229).

And he also said:

“Q. These telegrams speak of approvals at 45 shillings per deadweight ton per month, time charter, was that your complement at that time? A. Yes, sir, maximum rate. After we established the rate of 45 shillings there were no boats fixed over that rate; today the rate is 35 shillings, a gradual reduction from 60 shillings” (Ap. p. 217).

The maximum figure for the time here in controversy was thus 45 shillings per deadweight ton per month (Ap. p. 230).

Counsel for libelant, in cross-examining Mr. Smull, sought to show that the basic rate was not uniformly insisted upon by eliciting from the witness the fact that each “individual charter (was) scrutinized and individual judgment given upon it” (Ap. p. 219) and the admission that “you can’t make a fixed rule on all charters; every charter that comes in differs a little bit” (Ap. p. 220). But this absence of fixed rule on all charters did not go to the matter of *rates*; other clauses, conditions and terms might vary so that it could be said with truth that “every charter that

comes in differs a little bit" but the maximum rate, once settled, was always insisted upon as a standing rule not open to discussion. On this Mr. Smull is positive and explicit:

"Q. You have spoken of disagreements amongst the members about time charters, did those relate to the allowance of higher charters which amounted to higher rates as they worked out more than 45 shillings on the Pacific? A. No, no differences in rates, what different clauses would give the charterer more of a concession, or owner more of a concession, *but the rates were agreed upon; we have never had a discussion over rates until there came to be a general discussion, when it looked as if the rate should be lowered or raised, but when the rate was once decided on that was the basic rate;* but a charter party would come in, several charter parties have come in with the same rate but they will have all sorts of clauses rung in that affect the rates, affect the conditions, that is where there would be arguments pro and con as to whether those clauses should be allowed to stay in.

Q. Whether the particular clauses amounted to an increase in rates? A. Yes, you would be surprised to find out how many things were rung in" (Ap. pp. 230-231) (*italics ours*).

And again Mr. Smull testified in this connection:

"Q. One of your first determinations was fixing approximately what you considered a fair rate on these Pacific vessels of 45 shillings per ton dead-weight on time charter? A. Yes.

Q. Was it part of your policy therefore not to favor charters which worked out at higher figures, or berthings that worked out higher figures? A. Yes, anything that we thought would control the situation we adopted that plan" (Ap. pp. 229-230).

Counsel for libelant reviews Mr. Smull's testimony in part only at pp. 19-21 of appellant's brief and thus loses the vital point that the individual consideration of charters as they came to the committee were concerned not with the rate but with other matters. Mr. Smull shows clearly, if all his testimony be read, that the rates were fixed unalterably.

It was the time charter at this basic rate that the Committee preferred; no doubt because, as we have already pointed out, it saved the necessity of resolving other forms of charter into terms of tonnage and time to see whether the rates conformed to the basic rate which was imposed so that freight rates to shippers could be kept within bounds and still allow a fair margin of profit to the charterer. Thus Mr. Smull testified:

"Q. In the end of October or early in November was there any existing practice of the Chartering Committee with regard to the approval or non-approval of lump sum charters from the West Coast of this country to the Far East on neutral vessels, including Norwegian? A. *We endeavored from the start to get all neutral boats on time charter to reputable American houses for round trips Pacific and round trips in the Atlantic; that is, when the boat was in this country and was to load to a foreign port and return from that foreign port to this country.*

Q. In relation to that practice what was the practice of the Committee with regard to the request for approval of lump sum charters on neutral tonnage, auxiliary motor schooners or steamers from the West Coast to the Philippines or China, Japan and Australia? A. When you say lump sum charters, I presume you mean lump sum charters on gross form charters, where the

charterer pays so much for the freight room and the owner pays all other expenses including the loading and discharging of the cargoes?

Q. Yes? A. We did not favor the gross form of charter" (Ap. p. 191).

As to reasons Mr. Smull said:

"Q. Perhaps you will explain your reasons why you were trying to get the boats on time charters instead of approving gross form or lump sum charters. A. If steamers were approved for time charter it gave the Shipping Board direct control over what that boat should take in the way of rate and the cargoes she carried, and the commodities she should carry. We were at that time very short of certain commodities that were needed for war purposes, and in regulating the time chartered rate to a lower basis than prevailing on the Pacific we could then go to the time charterer and say he would have to take certain commodities at a certain rate, allowing enough leeway between the charter and the freight, both to and from the foreign country so the rates would be considerably lower than they were, so that gave us the power to regulate the port he should go to under the time charter; he would go to just the port we knew there was cargo, to take that in the interest of this country" (Ap. p. 192).

The owners of several neutral ships trading in the Orient refused to charter them on a time charter basis. These ships were allowed to come to the United States on the gross form of charter because the Shipping Board realized that once they entered an American port they could be forced to take the time charter rate.

"Q. Was the reason of the policy the desire to get control of neutral tonnage so that it could be required to return to United States ports? A. *In order to get them on time chartered basis, and hav-*



*ing the control of the boat in a United States port we could force them to take the time charter terms.*

Q. Force them to return here? A. And when the time charter is made it is made for a round trip, out and home again.

Q. So that the continuation of the neutral tonnage in our trade was part of that policy? A. Yes" (Ap. p. 194).

Thus it follows that—

**Second. The Chartering Committee normally disapproved lump sum charters.**

We advisedly say *normally* because, as heretofore indicated, the Committee occasionally went to the trouble of resolving lump sum charters into time charter tonnage terms and approving if, so resolved, they conformed to the basic rate. Usually, however, the Committee insisted on time charters. It did not want to be bothered with lump sum charters. An exception occurs in its indication of willingness to approve a lump sum charter on the "Arabien"—but the lump sum, as we shall later point out, was not in excess of the basic rate which was always required. In a moment we shall show that the proposed Moore charter was double the basic rate and could never have been approved. The normal attitude of the Committee toward lump sum charters is shown by the following excerpts from Mr. Smull's testimony:

"Q. \* \* \* what was the practice of the Committee with regard to the request for approval of lump sum charters on neutral tonnage, auxiliary motor schooners or steamers from the West Coast to the Philippines or China, Japan and Australia? A. When you say lump sum charter, I presume you mean lump sum charters on gross form charter, where the charterer pays so much for the

freight room and the owner pays all other expenses including the loading and discharging of the cargoes?

Q. Yes. A. We did not favor the gross form of charter'' (Ap. p. 191).

Counsel for libelant endeavors to make much out of Mr. Smull's testimony that he did not *think* the Chartering Committee would have approved the Moore \$400,000.00 lump sum charter. Mr. Smull's statement in this connection was:

“Q. It has been testified to in this case that a firm of merchants in San Francisco made an offer to the agents of the ship in San Francisco of \$400,000 for the round trip from San Francisco to two ports in the Philippines and return to San Francisco, and that this offer was under consideration at the time of the collision, out of which this controversy arises, which occurred on November 3rd; was the practice of the controlling Committee at that time such that in any reasonable trade this offer would have been approved if accepted by the owner? A. *I don't think it would*, but I want to qualify that by the statement that we have never said as a Committee what we would do until the charter was put before us.

Q. But in accordance with the practice that had been in vogue up to that time would this in normal course of procedure have been likely to have met with the approval of the committee? A. No. Our records show no approval to any Norwegian boat at that time'' (Ap. pp. 192-193).

Counsel claims this shows that the Moore charter *might* have been approved. That, if true would not sustain libelant's burden of proof to show with reasonable certainty that the Moore charter *would* have been approved. But, apart from burden of proof,

the *later* evidence is positively that the Moore charter could not have been approved. Mr. Smull in the statement quoted was giving his opinion that normally the Moore charter would be disapproved because it was for a lump sum. He would not say unequivocally that it would be disapproved on that ground. But no lump sum charter would be approved if, resolved into terms of tonnage and time, it exceeded the basic 45-shilling rate. The last quoted testimony was given early in Mr. Smull's deposition. His attention was not then directed to the question whether the lump sum was in conformity to the basic rate, and when asked later on whether the Moore charter would be approved if it should work out at more than the basic rate he was perfectly positive that it would not.

“Q. One of your first determinations was fixing approximately what you considered a fair rate on these Pacific vessels of forty-five shillings, per ton dead weight on time charter. A. Yes.

Q. Was it part of your policy therefore not to favor charters which worked out at higher figures, or berthings that worked out higher figures?

A. Yes. Anything that we thought would control the situation we adopted that plan.

Q. This offer that has been testified to of \$400,000 for a round trip would of course have worked out a much higher figure than your forty-five shilling time charter? A. I haven't figured it off-hand but I think it would, considerably.\*

Q. It would have been figured if you had an application for approval? A. Yes.

Q. *Whether approval had been sought and would have been granted would have depended on how the*

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\*As we show later, the Moore \$400,000 charter would work out at more than double the basic 45-shilling rate.

*rate worked out as compared with your forty-five shilling time charter?* A. Yes, sir.

Q. *Which was your maximum figure at that time?* A. Yes'' (Ap. pp. 229-230).

In other words, Mr. Smull, when asked early in his deposition without reference to the relation of the figures to the basic rate whether the Committee would have approved a lump sum charter on the "Bayard" said it probably would not because it was lump sum.

"\* \* \* we didn't want it on gross charter at all, we wanted it on time charter" (Ap. p. 235).

But asked whether that lump sum charter, if it involved rates above the basic rate, would be approved he said positively it would not. As a lump sum charter it would *probably* not be approved; as a lump sum charter exceeding the basic rate it *certainly* would not. We shall show presently that the Moore charter went far above the basic rate. Libellant therefore fails to sustain its burden of proof; and apart from burden of proof the evidence is that the charter on which it depends would not have been approved.

It has we think been shown, first, that for the period in question the basic rate was 45 shillings per deadweight per month, time charter, and that this rate constituted a fixed rule of the Committee subject to no variance and insisted upon for all charters; secondly, that the Chartering Committee normally disapproved lump sum charters. We shall now endeavor to show that—



Third. The only cases where the committee approved lump sum charters for neutral vessels were those (a) where, the vessel being in a foreign port, beyond the committee's control, it had to approve in order to get her into an American port and there subject to the committee's control and (b) where, taking into account the tonnage of the vessel and the length of the proposed voyage, the lump sum rate really equalled only the basic rate of 45 shillings per deadweight ton per month.

Libelant, faced with the undisputed demand of the Committee for time charters at the basic rate and its disapproval of lump sum charters, endeavors to sustain its burden of proof by the testimony of Mr. Arthur Page as to his experience with charters at the time in question (Brief pp. 19-20) and by reference to the cases of the "Arabien" and the "Transvaal" (Brief pp. 26, 29). The testimony of Mr. Page fails because it shows approval only of lump sum charters for neutral vessels in foreign ports which the Committee was trying to get to American ports where they could be controlled and placed under time charter, whereas the "Bayard" was in an American port. The proffered approval of a lump sum charter on the "Arabien" is explained by the fact that at the lump sum prescribed by the Committee (\$130,000.00, on which figure the Committee insisted as against the proposed \$170,000.00) the basic rate of 45 shillings would be complied with. The case of the "Transvaal" is months beyond the period to which both libelant and claimant expressly limited the investigations and is wholly immaterial and irrelevant. We now ask attention to the evidence showing how on these counts libelant has failed to sustain its burden of proof.

MR. PAGE'S TESTIMONY—APPROVAL OF NEUTRAL VESSELS  
IN FOREIGN PORTS AS THE ONLY MEANS OF GETTING  
THEM INTO AMERICAN PORTS AND THUS WITHIN THE  
COMMITTEE'S CONTROL.

Mr. Page thought that he had chartered a number of vessels out of San Francisco on lump sum charters during the period of the "Bayard's" detention (Ap. p. 23). Referring to his books, however, Mr. Page could only quote lump sum charters on the following vessels:

"The Transvaal" (Danish), November 27, Hong-kong and Manila to San Francisco;

"The Kina" (Danish), November 27, Manila to San Francisco;

"The Peru" (Danish), December 7, Philippine Islands to San Francisco.

That is to say, the only vessels which Mr. Page had chartered during this time on a lump sum basis were neutral vessels in the Orient far beyond the direct control of the Shipping Board. Mr. Smull remembered the approval of these charters by the Chartering Committee and the reasons why they were approved.

"Q. It has been testified that approval was secured by at least two steamers, I believe of Danish registry, perhaps a third, 'The Kina', 'Peru' and 'The Arabien', for return voyages from points in the Far East to San Francisco, what do you say as to that? Do you recall those cases?

A. Yes, I do because of the fact that they are all owned by the East Asiatic Company. This company refused to charter those boats from the East to the United States on a time charter basis. In order to get the boats to a United States Pacific port we had to agree to allow the boats to come

to the eastward on a gross form charter, we realizing that when the vessels once got to an American port we could control their movements through the War Trade bunker licenses. It did not seem to be possible to get the East Asiatic steamers on the Pacific Coast on any other basis. They refused time charters and we had to get them to a Pacific Coast port to control them; they were out trading in the East and we had no method by which we could detain them" (Ap. 193).

(It appears elsewhere that "The Transvaal" was intended here, instead of "The Arabien".)

After these three vessels got to Pacific Coast ports they were chartered on time charters and not on gross form charters (Ap. p. 245).

To continue with Mr. Page's testimony: examining his books for the period November 3rd to December 21st he found that he had also chartered the Norwegian vessel "Dicto" on November 20th from Seattle to the Orient and return, *but this was not on lump sum but on time charter at the forty-five shilling rate*, which he admitted was forced upon the vessel by the Shipping Board.

"Q. 'The Dicto', on the 20th of November, Seattle to the Orient and return, via Panama Canal. That was a time charter? A. A time charter.

Q. And the rate I notice here is forty-five shillings sterling per ton total deadweight. A. Forty-five shillings sterling.

Q. Do you know whether that was submitted to the Shipping Board? A. That was the first vessel which was ordered to, or was only allowed, forty-five shilling sterling; she was getting more money before *and the Government interfered there and made her accept forty-five shillings*" (Ap. p. 33).

The last lump sum charter upon Mr. Page's books for a trip out of San Francisco and return was the "Erris", an American (not a neutral) ship, which was chartered on October 13th on a lump sum charter (Ap. p. 34).

*It thus appears that from October 13th to November 27th, Mr. Page had made no lump sum charter for voyages out of San Francisco and the only records he had at all of lump sum charters during all of the months of November and December were on vessels in the Orient for voyages to the United States; those charters being approved because the Shipping Board desired to get the vessels involved into the United States where they could be controlled by this Government.*

Mr. Page admitted furthermore that he had had no occasion to ascertain the policy of the Shipping Board during the interval from November 3rd to December 21st as to whether or not it would have approved a lump sum charter. That policy it will appear presently would not permit the approval of lump sum charters, save in the exceptional cases to which we have adverted and the conditions of which the "Bayard" could not satisfy.

"Q. So there is nothing from your records here to indicate whether the Shipping Board was or was not requiring approval of lump sum charters as of November 3rd, is there? A. No, there is nothing there.

Q. Do you, as a matter of fact, know whether or not approval would have been required for a lump sum charter early in November? A. No, I do not know.

Q. I mean from your experience? A. No, I



had no occasion to find out, not from my knowledge.

Q. *Even this lump sum charter on the 'Erris' of October 13th is on an American vessel, not a neutral vessel, at all.* A. Yes.

Q. So the situation might be utterly different.  
A. Yes. I gave all the charters we had in our books" (Ap. pp. 34-35).

#### THE CASE OF THE "ARABIEN".

The American Asiatic Company of San Francisco telegraphed the Chartering Committee December 5th, 1917, as follows:

"1917 Dec. 5 AM 12 17

San Francisco Calif 4

Chartering Committee

United States Shipping Board

New York City N Y

Your telegram first instant relative chartering Arabien have offered hundred seventy thousand dollars lump sum this steamer one way Seattle to Japanese ports January sailing \* \* \*.

American Asiatic Company Inc."

(Ap. p. 195.)

The Chartering Committee telegraphed in reply:

"December 5, 1917.

Collect.

Day letter.

American Asiatic Company,

San Francisco, Cal.

Replying your telegram Arabien Committee cannot approve proposed sum hundred seventy thousand dollars but will approve hundred thirty thousand dollars Seattle to Japanese ports one Japanese steamer fixed yesterday this basis \* \* \*.

WR/O

Chartering Committee."

(Ap. p. 196.)

Thus the Chartering Committee declined to approve a charter of the "Arabien" at \$170,000.00 but expressed its willingness to approve a charter at \$130,000.00. This, counsel for libelant says, indicates that the Chartering Committee in practice approved lump sum charters and would have approved the Moore charter on the "Bayard" at \$400,000.00 (Brief p. 29). That we think does not follow. Counsel is silent on the action of the Committee in cutting the proposed charter hire from \$170,000.00 to \$130,000.00. This goes to the very heart of the issue. At \$170,000, lump sum, the charter hire would be in excess of the basic 45 shilling rate; at \$130,000, lump sum, it would conform thereto. It will be remembered as we have frequently suggested that the Committee, while preferring time charters at the 45 shilling rate and ordinarily disapproving lump sum charters, would in rare instances approve the latter if they conformed to the basic rate which for all practical purposes was the yard stick of measurement. Thus Mr. Smull said:

"Q. One of your first determinations was fixing approximately what you considered a fair rate on these Pacific vessels of 45 shillings per ton deadweight on time charter? A. Yes.

Q. Was it part of your policy therefore not to favor charters which worked out at higher figures, or berthings that worked out higher figures? A. Yes, anything that we thought would control the situation we adopted that plan.

Q. This offer that has been testified to of \$400,000 for a round trip would of course have worked out a much larger figure than your 45 shilling time charter. A. I haven't figured it but offhand I would think it would, considerably.

Q. It would have been figured if you had had an application for approval? A. Yes.

Q. Whether approval had been sought and would have been granted would have depended on how the rate worked out as compared with your 45 shilling time charter? A. Yes, sir.

Q. Which was your maximum figure at that time? A. Yes'' (Ap. pp. 229-230).

And Mr. Smull further testified in this connection:

By Mr. FRANK:

“Q. There is a difference in your mind between a gross charter and lump sum charter? A. Well, it all depends on what form of charter, you can have a gross lump sum or you can have a time charter lump sum; a gross form of time charter and a gross form on rates is the same; your gross form is the number of tons multiplied by what you are allowed on the gross charter.

Q. Whether or not that would be approved depends, as I understand you in reply to Mr. Kirlin, upon the provisions of the charter party itself outside of the fact that it is lump sum? A. Yes, sir.

By Mr KIRLIN:

Q. *Particularly as to how high the lump sum is, how it worked out as compared with your 45 shillings?* A. Yes'' (Ap. pp. 236-237).

As stated above, the “Arabien” at \$130,000 lump sum for a voyage Seattle to Japanese ports would be earning just what she would earn under time charter at the basic forty-five shillings per deadweight ton per month. This the following calculations show:

The deadweight tonnage of the “Arabien”, according to Lloyd’s Register of Ships, in its various annual editions, is 9440. She would earn per month, therefore, at the forty-five shilling rate 424,800 shillings (her

tonnage of 9440 multiplied by forty-five shillings). This reduced into pounds sterling at twenty shillings per pound would give 21,240 pounds as her monthly earnings. The pounds sterling expressed in dollars at \$4.86 to the pound would give \$103,226.40 as the vessel's monthly earnings in dollars at the forty-five shilling rate. The last figure divided by 30 would give \$3440.88 as her earnings per day at the basic rate.

The speed of merchant vessels having a capacity of twelve knots and above is listed in the appendix to the 1919-1920 edition of Lloyd's Register of Ships at p. 983. From the fact that the "Arabien's" speed is not listed, it follows that her speed does not equal twelve knots. As a matter of fact, we know by inquiry that her speed is about nine knots, but as this is not in the record we make our computations on the basis of Lloyd's Register, of which the court may take judicial notice. Her highest possible speed, seeing that her speed is not listed in Lloyd's, is eleven knots and in these calculations we use that figure, though it would obviously be to our advantage to have the speed lower, inasmuch as the faster the vessel the greater would be her earnings per day under the \$130,000 charter and we are here showing that the Shipping Board would not allow her to earn more than the basic rate. The distance from Port Townsend, near Seattle, to Yokohama is, according to Gram's Atlas of the World, page 6, 4202 miles, which reduced to knots is 3636.15 knots. At eleven knots per hour the vessel would consummate this voyage in 330.56 hours (3636.15 knots divided by 11 knots), or, dividing by



24, 13.77 days, or in round numbers 14 days. To this we add, fifteen days, as a fair allowance for loading and discharging, and eight days for additional ports, (seeing that the proffered charter was from Seattle to Japanese *ports*) plus one day for loss on the calendar, or an approximate total of 38 days, which would be consumed in performing the charter proposed in the telegram. The Chartering Committee of course had at hand all the data we have, and more, for such calculations.

As shown above, the earnings per day of the "Arabien" at the basic forty-five shilling rate would be \$3440.88. Multiplying this by 38 we get \$130,753.24 as the hire which the "Arabien" would earn at the basic forty-five shilling rate under the charter proposed in the telegram.

It is, therefore, apparent that the reason the Shipping Board declined to approve the proposed charter at a lump sum of \$170,000.00 but expressed its willingness to approve it at \$130,000 is that the latter transposed into terms of tonnage and time would work out at the basic rate.\*

On the contrary, the "Bayard" at a lump sum charter of \$400,000 would earn well more than twice the basic rate (see p. 59, *infra*).

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\*Before leaving this matter we wish to point out that counsel for libelant at page 29 of his brief has misunderstood Mr. Smull's testimony in part with reference to the "Arabien". Mr. Smull stated (Ap. p. 247) that the "Arabien," before she was fixed to the Shipping Board, was loaded in the Far East on berth for her owners' account without any charter to cover the transaction. Counsel for libelant has confused this voyage with the one offered by the American Asiatic Company in their telegram of December 5th.

## THE CASE OF THE "TRANSVAAL".

Counsel points to the "Transvaal" as chartered on a lump sum basis on March 18, 1918. (Brief pp. 26-27.) This was four months after the period here under inquiry. The "Bayard's" detention was November 3rd to December 21st, 1917. The material inquiry throughout the case was whether a lump sum charter carrying rates higher than the basic 45 shilling rate would have been approved *at that time*. On that period and on that period alone, was Mr. Smull examined. To it counsel for libelant as well as ourselves, limited the questions in terms. Mr. Frank's request was:

"I want access to the records of the Chartering Committee to ascertain what the records show with respect to the chartering of vessels *during this period from November 3 to December 21*" (Ap. p. 226).

The Committee (Mr. Smull not voting—Ap. p. 246), voted that it could not show Mr. Frank these records. But Mr. Smull testified that *during this period* (and he was not examined and counsel for libelant did not ask to examine him on any other), there were no approvals of lump sum charters, save only those for neutral vessels which the Chartering Committee wanted to get into this country and within its control. Mr. Smull, under cross-examination by Mr. Frank, testified:

"Q. Since then I understand you have also made examination and found no cases of disapproval of any such charters? A. Yes, sir, between, *as you requested*, the dates of November 3d and December 21st.

Q. Didn't you make an examination to cover the same time to which you testified in this case? A. Yes, that is the time I believe.

Q. The time you testified to here was the time you entered upon the duties in the Chartering Committee—"From the time I went in there no approval of steamers on round trip steamers up to the first of the year"? A. Yes, that is all right.

Q. "Yes, I went through our list of approvals up to about the 1st of the year and from the time I went in there are no approvals of steamers under foreign flag, round trip charters." A. Round trip charters; we use the words "round trip charters" to mean time charter round trip, and the record of that answer seems to be a little confused because I did not mean no record of round trip time charters: there was no record of charters for round trip on the gross form of charter.

Q. Is there any record of any lump sum charters during the entire time mentioned, either of approval or disapproval? A. Not for round trip, no.

Q. Am I to infer from that that there may be some others in the record for approval or disapproval of lump sum charters for a single trip either way? A. Yes, there were.

Q. That is the few that you referred to as being homeward? A. Homeward, yes.

Q. Homeward bound? A. Yes, sir.

Q. Otherwise there is nothing in the record? A. Nothing else.

Q. That covers the entire proposition without any distinction at all; you are making a distinction of round trip that covers the whole thing? A. Gross form.

Q. Lump sum charters? A. On lump sum charters" (Ap. pp. 239-241). (Italics ours.)

Our inquiry on direct examination also covered this period only:

"Q. Did you say you had examined your records before you came to see whether you had approved any lump sum charters the end of October or early November? A. Yes, I went through our list of approvals up to about the first of the year,

and from the time I went in there are no approvals of steamers under foreign flag round trip charters.

Q. Lump sum? A. Lump sum gross form. The only approval was several of these boats in the East we had to get this way and we allowed a lump gross charter to get them here.

Q. After you got the Kina, Peru and Arabien here did you approve any lump sum charters on them? A. No, they are all chartered to the United States Shipping Board now.

Q. All on time charters? A. Yes" (Ap. pp. 216-217).

And the court itself in overruling Mr. Frank's objection to the taking of Mr. Smull's testimony and in consenting that it be taken, asked that the testimony cover the period of the "Bayard's" detention.

"The COURT. I would prefer that your proof should include both as to whether they had approved *during this period* time charters—as to whether they had not approved or had refused to approve them covering all cases *during that period* in regard to charters of this kind" (Ap. p. 125).

Thus counsel for libelant, counsel for claimant and the court understood that the inquiry was to be directed to the period November 3rd to December 21st, 1917.\*

Mr. Smull's testimony *on this period* was taken in New York on September 30th and on October 18, 1918.

Two months afterward counsel for libelant offered in evidence the "Transvaal" charter party of March 23, 1918. We admitted its execution and that the vessel

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\*Our offer was in broader terms (Ap. p. 125) but the understanding was that the inquiry should be, and it correctly was, for the *material* period, namely, November 3, to December 21, 1917.



sailed under it but objected to its relevancy and materiality and have insisted throughout on that objection as well taken. Mr. Smull's deposition was two months over. A lump sum charter party approved in March, 1918, would be immaterial to prove that a lump sum charter party would have been approved between November 3rd and December 21, 1917. No lump sum charter party was approved during that period and the evidence is that none would have been. We quote from the transcript of December 18, 1918, containing the objections:

“Mr. FRANK. Your Honor will remember that this case was tried up to a point where Mr. Griffiths wished to take some depositions in the East. He took those depositions. I don't know about his introducing them. In the meantime there are some little matters that I wish to present to the court.

I have here a charter party under date of the 22nd day of March, 1918, of the Danish steamer ‘Transvaal’, which Mr. Griffiths is prepared to admit was made and executed and approved by the chartering committee of the board and interallied chartering executive committee of London.

Mr. GRIFFITHS. The chartering committee. Was it approved, as a matter of fact, by the interallied chartering executive committee?

Mr. FRANK. Well, as a matter of fact, the voyage was preformed under the charter party.

Mr. GRIFFITHS. Yes, I know that.

Mr. FRANK. We ask that that be admitted in evidence; we will call it Libellant's Exhibit A as of this date.

Mr. GRIFFITHS. By the way, Mr. Frank, with regard to the offer of that charter party, dated March 22, 1918, I consent to that, that is, I stipulate that the charter party was executed and that it was approved by the chartering committee of the Shipping Board, and that the vessel sailed under that

charter; that is, I do not question the charter party, and that that is a true copy. *My stipulation does not go to any consent to its materiality. I claim that it is away beyond the period examined into in this case, and in the depositions taken in New York.*

Mr. FRANK. *I understand that.*

Mr. GRIFFITHS. *What I mean was that I know the charter was executed, but I claim that it is immaterial and irrelevant and was offered too late and we could not examine our witnesses in the East upon it.*

Mr. FRANK. That was an entirely different proposition. It was offered just as quickly as I got it. I showed it to you just as quickly as I got it. I surely did not hold it out.

Mr. GRIFFITHS. I don't question that at all.

Mr. FRANK. And if those fellows had allowed me to examine their record I would have had it right there.

Mr. GRIFFITHS. I understand that in the East they asked you if you wanted any further examination of Mr. Smull beyond the end of December; this examination covered up to the end of December.

Mr. FRANK. *I asked them for a full examination of all of their records and they declined to let me have them; then it was limited to January 1st, and even that was declined.*

Mr. GRIFFITHS. *Well, the record will show what the situation is in that regard"* (Ap. pp. 252-254).

The record shows, as we have pointed out, that Mr. Frank's inquiry was limited explicitly to the period November 3rd to December 21st, 1917. Mr. Frank on cross-examination of Mr. Smull, said:

"Q. So you can have it accurate, I want to have an opportunity to go over the records myself?

A. You want to know whether I can show you the exchange letters on the subject of "Bayard"-  
"Beaver"?"

Q. Yes? A. What else?

Q. *I want access to the records of the Chartering Committee to ascertain what the records show with respect to the chartering of vessels during this period from November 3 to December 21?*

A. You mean as to approvals and disapprovals?

Q. Yes, as it appertains to the facts we have been examining about in this case? (Ap. pp. 226-227)

Access to the records, as we have said, could not be given him, but Mr. Smull examined the records *for the very period requested by counsel and there was no suggestion that he go into the year 1918.* To bring in a charter party dated months after the period under investigation and at a time when, even if material, there could be no cross-examination of the Chartering Committee on it, is patently subject to the objection we took. The District Court in effect sustained the objection and rightly, we think, gave no consideration to the "Transvaal" charter party.

We have shown first, that for the period in question, the basic rate was 45 shillings per deadweight ton per month, time charter, and that this rate constituted a fixed rule of the Committee subject to no variance and insisted upon for all charters; secondly, that the Chartering Committee normally disapproved lump sum charters; thirdly, that the only cases in which the Committee approved lump sum charters for neutral vessels were those, (a), where the vessel being in a foreign port beyond the Committee's control, it had to approve in order to get her into an American port and there subject to the control of the Committee and (b), where

taking into account the tonnage of the vessel and the length of the proposed voyage, the lump sum rate really equalled only the basic rate of 45 shillings per deadweight ton per month. We now propose to show, that—

**Fourth.** The proposed \$400,000 lump sum Moore charter was for a voyage outward from San Francisco, the vessel being in this port, and amounted to more than twice the basic rate and could not possibly have been approved.

The “Bayard” at the time under consideration was lying in the harbor of San Francisco. The motive that led the Chartering Committee to approve lump sum charters on three Danish vessels in the Orient (and these were the only lump sum charters that were approved during the period in question), viz.: to get them into the United States and within the control of the Shipping Board, would not therefore apply to the “Bayard”.

Nor can it be said that the proposed lump sum charter on the “Bayard” would have been approved upon the theory that, though lump sum in form, its figure of hire reduced into terms of tonnage and time would not exceed the prescribed 45 shilling basic rate. It would exceed the basic rate as the following calculations show.

Under the Moore lump sum charter the vessel would net the owners, taking the figures of counsel for libellant, \$4215.56 per day (Brief p. 45).

At the Shipping Board’s prescribed basic rate of 45 shillings per deadweight ton per month, the vessel would net the owners \$1635.40 per day. This is calculated as follows:



The "Bayard" was 5200 tons deadweight (Ap. pp. 21, 43, 197). Multiplying this figure by 45 shillings we get an earning for a month of 234,000 shillings. This reduced into pounds sterling (20 shillings to the pound) gives 11,700 pounds sterling per month. Pounds sterling reduced into dollars at \$4.86 to the pound gives \$56,862 per month. Divided by 30 this gives as the gross earnings per day \$1895.40. Under time charter the charterer pays the general expenses (Ap. pp. 114, 115), but the owner pays the wages, provisions, stores and engine stores (Ap. p. 236) which for the "Bayard" were \$260.00 per day (Ap. p. 43 and Libelant's Brief, p. 44). We accordingly, deduct \$260.00 from the gross earnings of \$1895.40 and get \$1635.40 per day as the net sum to which the "Bayard's" owners would be entitled at the basic rate of 45 shillings per deadweight ton per month.

Summarizing, then, under the Moore lump sum charter, the owners would net \$4215.56 per day; whereas at the basic rate they were entitled only to \$1635.40 per day. It cannot, therefore, be contended that the Moore charter might have been approved because, though lump sum in form, its rate of yield was substantially in accord with the basic 45 shilling rate. It was much more than double. And, as we have seen, while by rare exception to the normal rule, charters not of the time form were sometimes approved, the basic rate was insisted upon uniformly, and the consideration of charters individually was never concerned with rates *except to insist that the basic rate be absolutely observed* (Ap. p. 230 and see p. 36, of this Brief).

Thus, so far from libellant's having sustained its burden of proof to show that the Moore lump sum charter would have been *approved*, the evidence is positively that it would have been *disapproved*: time charters were preferred and normally required; lump sum charters were disapproved except to get neutral vessels into the United States and in rare cases where the lump sum rate resolved into terms of tonnage and time did not in fact exceed the basic 45 shilling rate. The "Bayard" comes under neither of the last named categories.

The actual negotiations concerning the "Bayard" and the "Brazil" (which was under the same managing ownership) prove, we respectfully suggest, the soundness of the foregoing conclusions and to these negotiations we now accordingly ask the court's attention:

(c) *The negotiations concerning the "Bayard" and "Brazil".*

These show, we think, that the Chartering Committee would not approve charters unless they were in time form at the forty-five shilling rate, or, in exceptional cases, in lump sum form which would work out at that basic rate. With specific reference to the "Bayard" and "Brazil", the negotiations show immediate approval by the Committee of proffers of time charters at the forty-five shilling rate and the futility of efforts to get the Board to consider lump sum charters in excess of the basic rate, and, incidentally, of proposed berthing for owners' account.

With this by way of preface, we proceed to a review of the negotiations. They open with the telegram dated

December 5, 1917, from the American Asiatic Company of San Francisco to the Chartering Committee, reading as follows:

“1917 Dec. 5, AM 12 17.

San Francisco Calif. 4

Chartering Committee United States Shipping Board,

New York City NY

Your telegram first instant relative chartering Arabien have offered hundred seventy thousand dollars lump sum this steamer one way Seattle to Japan ports January sailing also have bid two hundred seventy thousand dollars motorship Bayard one Pacific round San Francisco to Japan and return San Francisco or Atlantic Coast must have two steamers to clear our congestion freight this port and we were advised that owners these steamers will not charter on Government form time basis but will place same on berth themselves for other ports if you can't approve our bids can you not help us arrive at some agreement with the owners in order that we will not lose the steamers and further congest this port.

American Asiatic Co. Inc.”

(Ap. p. 195.)

The Committee replied the same day:

“December 5, 1917.

Collect

Day Letter

American Asiatic Company,  
San Francisco, Cal.

Replying your telegram Arabien committee cannot approve proposed sum hundred seventy thousand dollars but will approve hundred thirty thousand dollars Seattle to Japan ports one Japanese steamer fixed yesterday this basis *telegraph total dead-*

*weight carrying capacity motorship Bayard.*  
 WR/O                      Chartering Committee.”\*  
 (Ap. p. 196.)

To the last quoted telegram the American Asiatic Company replied the same day that the total deadweight capacity of the “Bayard” was 5300 tons (it was in fact 5200, Ap. pp. 21, 43, 197) and the bale capacity 393,419 cubic feet (Ap. p. 197). The Committee telegraphed back on Dec. 6th, disapproving the proposed lump sum charter (Ap. p. 197). The very next day G. W. McNear, Inc., telegraphed the Chartering Committee for approval of proposed time charters on the “Bayard” and “Brazil” at forty-five shillings per deadweight ton per month (Ap. p. 198). The Committee immediately approved (Ap. p. 199).

Thus, we have within the space of two days a proposed *lump* sum charter on these vessels for a trans-Pacific voyage *disapproved* and a proposed *time* charter at the forty-five shilling rate forthwith *approved*. We also find in the first exchange of telegrams a disapproval of a lump sum charter on the “Arabien” for \$170,000.00, but an indication that a lump sum charter on her for \$130,000.00 would be approved.

Bearing in mind the point to which we have so frequently asked attention, namely, the absolute insistence of the Board on its basic forty-five shilling rate as the maximum, whether that rate appeared directly expressed in time charter terms or was, in fact, the rate on such lump sum charters as were approved, these exchanges

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\*The part of these telegrams referring to the “Arabien” has already been discussed (pp. 47-51, *supra*).



of telegrams are most significant and, we urge, uphold our contentions in this controversy.

Counsel for libelant (Brief, p. 29), note with satisfaction that while the "Arabien" was disapproved at \$170,000.00 she was approved at \$130,000.00 lump sum. But we think they miss the significant point, namely, that the reason the Committee insisted upon the reduction was to bring the rate into conformity with the basic forty-five shilling rate; as shown on page 51, *supra*, of this brief, the lump sum of the charter of the "Arabien" at \$130,000.00 would so conform. The case of the "Arabien" thus supports our thesis that the only lump sum charters which the Committee would approve were those which were not in excess of the basic rate.

Similarly, counsel note with satisfaction that the Committee, when asked by the American Asiatic Company to approve a lump sum charter on the "Bayard" for \$270,000.00, instead of declining flatly, asked for the "Bayard's" deadweight tonnage (Brief p. 29). Here, again, with all respect we believe counsel miss the point. Obviously, the Committee, being informed by the telegram of the contemplated voyage, needed only the tonnage in order to calculate whether the figure of \$270,000.00 would be in excess of the basic forty-five shilling rate. Being furnished the tonnage, they immediately telegraphed that the proposed lump sum charter would not be approved. And why? Manifestly, because the hire was something over \$1000.00 per day in excess of the basic rate. The voyage proposed was "One Pacific round San Fran-

cisco to Japan and return, San Francisco or Atlantic Coast". The voyage for which the Moore charter was intended was from San Francisco to ports in the Philippines and return. The Philippines are further than Japan, but the American Asiatic charter allowed an option of return to an Atlantic port. It is obvious that the margin of difference between the time and expense of the two voyages was little or nothing.

The expense of such a voyage libelant gives at page 45 of its brief as \$41,677.00. Deducting this sum from the proposed hire of \$270,000.00 we have as the net earning of the "Bayard" for this proposed charter to the American Asiatic Company \$228,323.00 which divided by 85 (the approximate number of days that would be employed in earning the hire, Brief, p. 45), gives \$2686 as the net earning per day under this charter had it been approved. We have shown at page 59, *supra*, of this brief, that the net earning of the "Bayard" at the basic maximum rate approved by the Committee of 45 shillings per deadweight ton per month would be \$1635.40. Therefore, the American Asiatic Company were proposing a lump sum charter more than \$1000 in excess of the basic rate, and this the Committee disapproved.

Can it be seriously contended that the Chartering Committee would have approved the Moore charter which was twenty-six hundred dollars in excess of the basic rate, when it disapproved the American Asiatic charter which was a thousand dollars in excess of the basic rate?

Counsel for libelant rely (see Brief pp. 19-23) on Mr. Smull's testimony to the effect that charters were

individually examined and considered and that it could not be stated in advance whether a particular charter would or would not be approved, (Ap. pp. 103, 219) *but overlook Mr. Smull's testimony that the debate and consideration of individual charters never went to the question of rates except where a change in the basic rate was under discussion—the basic rate once fixed was absolute for all charters coming before the Committee and no charter, whatever its form, would be approved if in excess of this basic rate, and a charter, even if conforming so far as the actual recital of rates was concerned to the basic rate, would not be approved if there were other clauses which in reality brought the rate above the basic rate.*

“Q. You have spoken of disagreements amongst the members about time charters, did those relate to the allowance of higher charters which amounted to higher rates as they worked out more than 45 shillings on the Pacific? A. No, no differences in rates, what different clauses would give the charterer more of a concession, or owner more of a concession, but the rates were agreed upon; we have never had a discussion over rates until there came to be a general discussion, when it looked as if the rate should be lowered or raised, but when the rate was once decided on that was the basic rate; but a charter party would come in, several charter parties have come in with the same rate but they will have all sorts of clauses rung in that affect the rates, affect the conditions, that is where there would be arguments pro and con as to whether those clauses should be allowed to stay in.

Q. Whether the particular clauses amounted to an increase in rates? A. Yes, you would be surprised to find out how many things were rung in” (Ap. pp. 230-231).

To continue with the negotiations on the "Bayard" and "Brazil". As we have stated, the Chartering Committee immediately approved the McNear offer of a charter of 45 shillings per deadweight ton per month, subject only to the proviso that the Shipping Board must have priority on homeward business (Ap. p. 119). The significance of this proviso is that one of the chief objects of the Committee was to insure the carriage during these war times of the most essential commodities (Ap. p. 192); and also that the Chartering Committee was working in co-operation with the so-called Interallied Chartering Committee in London. There was apparently an agreement between England on the one hand and Denmark, Norway and other neutral countries on the other that they would not permit charters of their vessels unless the voyages were approved by the Interallied Chartering Committee. This Committee had been actively in operation long before the "Beaver"- "Bayard" collision, and the necessity of submitting neutral charters to it for approval was experienced by the United States Chartering Committee every day in the conduct of its business (Ap. p. 209). The approval of the McNear charter by the American Chartering Committee, therefore, did not end the matter. This is at once evident from McNear's next telegram (Dec. 15th) in which he states that cables have been sent for the approval of the Interallied Chartering Committee upon a return cargo of wool from New Zealand, and requests the United States Chartering Committee's approval of this homeward cargo (Ap. p. 200). To this, the Chartering Committee at New York assented (Ap. p. 201) and



McNear accepted the wool cargo tentatively while awaiting the approval from London (Ap. p. 201). Later, (Dec. 16th) McNear telegraphed the Chartering Committee in New York that he had received a wire from London disapproving the charter of the "Brazil", and asked the United States Chartering Committee to take up the matter with the Interallied Committee (Ap. pp. 211-212). Meanwhile, no word had come from Olsen & Company accepting the McNear charter of the "Bayard" and "Brazil". On December 18th, McNear telegraphed that the San Francisco agents had received word from Olsen & Company that, *subject to the approval of the Shipping Board*, the owners had arranged for a cargo of wheat and flour from Australia. McNear then begs the Shipping Board to exert its power and to insist on wool as a part of the cargo of the "Bayard" and suggests a compromise, namely, that the "Bayard" bring wool and the "Brazil" bring wheat (Ap. pp. 202-203).

Three days later, December 21, McNear telegraphed again his fear that the Interallied Committee would not yield and asked the Chartering Committee to authorize him to send a telegram to the owners of the "Bayard" that the Shipping Board approved berthing the vessels to New Zealand and Australia,\* would maintain its

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\*This meant berthing not for owners' account but by McNear, the charterer, as shown by the last portion of McNear's wire, "Please wire at once, if we may send this cable *and proceed booking cargo outward*" (Ap. p. 204). Counsel for libelant must be mistaken (Libelant's Brief, p. 32) in taking this telegram and the Shipping Board's reply to it as an approval of berthing for owners' account. This we confidently think is shown at pages 71-74, *infra*, where these telegrams are fully considered in connection with discussion of the Committee's attitude toward berthing neutral vessels for owners' account.

right to indicate the return cargo and would undertake to arrange accordingly with the Interallied Committee (Ap. p. 204). The Chartering Committee immediately authorized this telegram, but reminded McNear that the outward cargo space must be divided among the several interests at San Francisco, and not given to any one interest. It also advised that the cargo be not booked until the approval came from the Interallied and the owners (Ap. p. 205). Later, on the same day (Dec. 21), the Chartering Committee telegraphed that it preferred the Pacific Coast voyage but was still awaiting word from London (Ap. p. 206). McNear answered that equal apportionment and equal rates would be given on regular shipments to New Zealand, and stated that he had the owners' approval for these voyages and also the Interallied's sanction, providing that the homeward cargo was wheat and flour for the East Atlantic coast (Ap. p. 207).

McNear was mistaken about the owners' approval, however, for on December 24th he wired that the London agents of the "Bayard" and "Brazil" had cabled that the owners had signed with the English wheat executives for return cargoes of wheat and flour to the East Atlantic coast (Ap. pp. 207-208).

The telegram from McNear three days later (Dec. 27), referring to the previous telegram, explains how the whole misunderstanding arose, namely, that the McNear offer to the owners of time charters crossed the London agent's cable advising that a cargo of wheat had been already accepted from Australia to the East Atlantic coast by the owners, and instructing the

San Francisco agent to berth the vessel for New Zealand, *subject, of course, to the approval of the Shipping Board* (Ap. pp. 214-215). McNear then referred to the Shipping Board's disapproval of berthing vessels for owners' account, and suggested that the owners be notified that the time charter was still open and that the Shipping Board disapproved berthing the ships for owners' account (Ap. pp. 214-215).

Negotiations were closed with a telegram from McNear on January 4th, stating that the Interallied Committee had agreed that both vessels should return to the Pacific Coast with cargoes of wool *and that the owners had accepted the time charter* (Ap. p. 215). To this the Shipping Board replied that approvals upon the outward cargo should come from the Cook Shipping Board, that is, the local Board at San Francisco.

We have reviewed these exchanges of telegrams as showing significantly, first, a disapproval of a proposed lump sum charter on the "Bayard" when her given tonnage revealed that the lump sum was more than \$1000 in excess of the basic rate; secondly, that the Committee refused a lump sum charter on the "Arabien" which would have been in excess of the basic rate, but said it would approve one in conformity thereto; thirdly, that the McNear proposal of charters on the "Bayard" and "Brazil" at 45 shillings per dead-weight ton per month, time form, was immediately approved; fourthly, that an attempt of the owners to have the vessels berthed for their own account was unsuccessful; and, finally, that the vessels sailed under time charter at the basic 45 shilling rate.

The telegrams are interlinked. Counsel for libelant on pages 30-33 of their brief, attempt to construe them separately as relating to several different offers to which various replies were made by the owners. That was not the situation. Such a view must assume that reply cablegrams came from the owners in Norway in an impossible interval of time. Mr. Kutter testified on the trial that it took approximately two weeks to get a reply cable from Norway (Ap. p. 117), whereas libelant would have answers coming from the owners at three day intervals (see particularly pp. 30-32 of Libelant's Brief).

Counsel also, as we have previously pointed out, erroneously interpret the exchange of telegrams of December 21st between McNear and the Chartering Committee as approval by the latter of berthing for owners' account. This follows, as we shall indicate under our next heading, from counsel's consideration of these telegrams in isolation instead of in their interlinking connection with the whole series of telegrams. Read in context they obviously do not contemplate a departure from the previously submitted time charter but were intended to straighten out the controversy between McNear and the Shipping Board on the one hand and the Interallied Committee on the other as to whether the vessels should take wool or wheat from Australia and New Zealand to this country. The berthing, as clearly appears in the discussion, immediately ensuing, was a berthing for *charterer's*, not *owners'*, account. The telegram of December 27th (Ap. p. 214), interpreting further the telegram of December 21st



(Ap. p. 204), shows this to be the situation and that McNear clearly understood that never at any time would the Board approve berthing the vessel for owners' account, and that he could not have meant that in his telegram of December 21st.

(d) *Berthing for owners' account.*

Libellant rests its claim for damages for demurrage upon the Moore charter. Since, however, it refers to berthing of the vessel for owners' account also, though it makes no claim for damages based thereon, we presume its thought is that a showing that the Shipping Board would have approved berthing for owners' account will tend to sustain its contention that the Moore charter, yielding less money, would similarly have been approved; but libellant has not proved that the Shipping Board would have countenanced a berthing of the vessel for owners' account, and, apart from the burden of proof, the evidence is to the contrary.

The Committee's control extended not only to charters but to voyages where no charter party existed. Mr. Smull testified:

"Q. When was it that you began to interfere with the placing of vessels on the berth for the account of the owner? A. Almost immediately.

Q. I understand, Mr. Smull, that in October and November no vessels were permitted to be placed on the berth for account of the owner?

A. I would not say that absolutely, I would not say that offhand; it is a big question; that was the idea.

Q. You have not looked into it, you have no recollection about it, is that the situation? A. I have a recollection of Norwegian boats on the Paci-

fic, we did not want the owners to berth or charter on gross form of charter, for almost immediately we reduced the time charter rates, we were trying to get the owners to come into time charter conditions to reputable firms.

Q. You were feeling your way, you didn't feel you had control of the situation? A. No, we had control right away of boats that were in this country, we didn't have it when they were up in Canada, up in Vancouver, which was rather a sore point.

Q. You would not undertake now to say that such vessels were not placed in berth during the period here in question? A. To the best of my recollection there were no boats on berth on account of owners.

Q. Your recollection, I believe you have no record in mind or no memory about it? A. I do not recollect any boat that was on the berth after the 1st of November, Norwegian boat after the 1st of November.

Q. What period are you speaking of—I mean around the 3rd of November? A. I would not say the exact date, I would say about the 1st.

Q. You mean the first part of November, not the first day? A. Yes.

Q. It might include the 3rd of November? A. Yes.

Q. Probably a week or two after? A. I don't know, about the first of November is about all I can say; it might have been in October, because we tried to do that right away" (Ap. pp. 220-221).

Bearing in mind that it was a primary object of the Shipping Board to control the selection of commodities to be shipped and to ensure the prosecution of voyages for essential purposes and the retention in those anxious war times of as many neutral ships as possible in the trade of the United States, and consequently to get as many neutral vessels as possible

under charter to "reputable American firms", to use Mr. Smull's phrase, it is obvious that berthing of neutral vessels for owners' account could not meet the approval of the Committee. *It would deprive the Committee and the Government of any control over the commodities to be shipped inward to the United States and would make it impossible for the Committee to ensure, once a neutral vessel had sailed from an American port, that she would return here and remain in our trade.*

In the negotiations that resulted finally in the time charter of the "Bayard" to G. W. McNear, Inc., it will be remembered that the Chartering Committee approved this charter immediately but that the telegram to the European owners containing this McNear time charter crossed a telegram from the owners to their San Francisco agent, advising the latter that the owners had arranged for a homeward cargo of wheat on the "Bayard" and "Brazil" from Australia, and instructing the agent that these vessels should be berthed outward from San Francisco for owners' account. With both the time charter and the proposal for berthing for owners' account before it, the Chartering Committee selected the former, obviously because the latter would, once the vessel had left San Francisco, have placed her beyond the control of the government of the United States perhaps for the entire period of the war.

Counsel for libelant interpret the exchange of telegrams of December 21st between McNear and the Chartering Committee as showing that the latter were ready

to approve a berthing for owner's account (Brief p. 32). We think this a misinterpretation of these telegrams, both in and of themselves, and in their relation to the series of telegrams which made up these negotiations. Before pointing out this error in detail, we beg for clearness' sake, to quote the telegrams. The first was from McNear to the Chartering Committee and read:

"San Fran Dec. 21, 17.

Chartering Committee,

U. S. Shipping Board, Custom House, N. Y.

Regarding motorships Bayard Brazil unless you bring strong pressure to bear on Interallied fear they won't let go in any event there will be further delay in view of all the circumstances please authorize us to send following cable to owners quote Bayard Shipping Board have approved berthing vessel New Zealand and Australia but maintaining privilege indicating priority return cargo destination American Pacific or Atlantic port undertaking to arrange accordingly with Interallied Committee unquote *please wire at once if we may send this cable and proceed booking cargo outward which you will understand takes time to get forward.*

3 26P

G. W. McNear."

(Ap. p. 204.)

The Chartering Committee replied:

"December 21, 1917.

Collect

Day Letter

G. W. McNear, Inc.,

San Francisco, Cal.

Bayard Brazil Washington authorizes us to wire you to go ahead on these vessels as per your telegram but Carry asked us to remind you that his understanding on the outward business cargo to be booked subject his confirmation in other words



cargo space will be divided among the several interest at your loading port and not given to any one party if you get confirmation from owners we will endeavor to get Interallied to agree to the voyages of both vessels stop on homeward voyages we must have priority as per your telegram *would not advise booking cargo until you get confirmation from owners and Interallied sanction.*

JBS/O

Chartering Committee."

(Ap. p. 205.)

Now, obviously, McNear and the Committee had in mind not a berthing of the vessel *for owners' account* but a berthing of the vessel *by McNear* after receiving a time charter from the owners, for which he had previously secured the Committee's approval (Ap. p. 198). In giving its approval the Chartering Committee prescribed simply that "Shipping Board, Washington, must have priority on homeward business" (Ap. p. 199). This led to difficulties because McNear and the Shipping Board wanted to bring back wool, whereas the Interallied Committee and the owners wanted to bring back wheat or flour. It was in the effort to straighten out this difficulty as to the homeward cargo that McNear's telegram of December 21st was sent to the Chartering Committee (Ap. p. 204). That McNear intended to book the cargo himself is shown by the phrases we have italicized above in his wire and in the Committee's reply. In his telegram McNear asked whether he might proceed booking cargo, and the Committee in its reply suggested that it would not advise his booking cargo until confirmation came from the owners and the Interallied Committee. McNear, apart altogether from the wording of the telegrams,

certainly would not be booking cargo for the owners' account because the owners had their own agent in San Francisco, the Norway Pacific Line. McNear throughout was seeking a charter. Finally McNear's telegram of December 27th to the Shipping Board shows clearly that he understood all along that the Board would not approve a berthing for owners' account. His telegram of December 27th reads:

“San Francisco, Dec. 27, 17.

Chartering Committee,  
U. S. Shipping Board, Custom House,  
New York.

Bayard Brazil replying your wire twenty first sorry if there has been any misunderstanding stop agents of owners cabled firm offer our account forty-five shillings time charter terms delivery here redelivery here in meantime agents here received cable from London agents of owners advising acceptance full cargoes wheat and flour for these vessels from Australia to East Atlantic Coast subject approvals Shipping Board and further instructing them to berth vessels for New Zealand and Australia stop we tried to make this position clear to you in our telegram twenty-first which please re-read in conjunction with your reply same date stop considering that you disapprove berthing vessels we should advise agents to cable owners renewing our offer time charter terms telling them Shipping Board disapprove berthing owners account please confirm at once stop regarding wool account Textile Alliance we felt we already had your approval see your letter December fifteenth but in view of Inter-allied insistence that vessels bring up wheat and flour we suggested that you get their sanction for the wool which we understand urgently needed for war purposes.

345P

G. W. McNear.”

(Ap. p. 214.)

It should be particularly noted that McNear here asks a rereading of his telegram of December 21st as showing that he was trying to adjust the difficulty as to whether the homeward cargo should be wheat and flour or wool but that he never intended by the telegram of December 21st to suggest a berthing for owners' account, because he knows "you disapprove berthing vessels".

To interpret these and other telegrams in the record correctly it is necessary that they be read in their interlinking relation with all the other telegrams, and not in isolation.

It has now been demonstrated, we venture to think, that libelant has not sustained its burden of proof to show with reasonable certainty that the Moore \$400,000 charter on which it bases its claim for damages for demurrage would have been approved; and furthermore that, apart from burden of proof, the evidence is to the contrary. Nor has libelant shown with reasonable certainty, or indeed at all, that the berthing of the vessel for owners' account, referred to by counsel for libelant as a possibility but not relied upon as proof of damages, would have been approved and the evidence is that it would not have been. This brings us to the next point which is that—

4. The evidence shows that, not having approval of the Moore charter and not being permitted to berth the vessel for its own account, libelant would have allowed the "Bayard" to lie idle rather than sail her at rates which would have been approved. Consequently, libelant has not sustained its burden of proof to show that its vessel would have been employed but for the collision. Apart from burden of proof the evidence is that, regardless of the collision, the "Bayard" would have been idle during the period in question.

*The idleness of the "Brazil".*

The contention that the owners of the "Bayard" were injured by the loss of the vessel's time must be considered in conjunction with the situation in respect to the "Brazil" which was under the same managing ownership. This was a Norwegian motorship, twin screw, of the same general type as the "Bayard" and engaged in the same sort of trade.

The "Brazil" entered San Francisco Harbor on November 13, 1917 and remained idle there until the middle of January 1918 (Ap. pp. 118-120). She left about the same time as the "Bayard" which was January 17, 1918\* (Ap. p. 120).

Thus, out of the seventy-five days during which the "Bayard" was in San Francisco harbor the "Brazil" was there about sixty-five days. A period of voluntary idleness on the part of the "Brazil" occurring almost simultaneously with the period during which the "Bayard" was laid up for repairs and because of which

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\*The exact day of the "Brazil's" departure does not appear in the record. Captain Larsen of the "Brazil" verified some of her War License papers from San Francisco on January 14, 1918 (Ap. pp. 96, 97, 98, 102) and her departure was, of course, subsequent to that date.



the owners claim that they were damaged so severely! In view of the facts of the case—the extraordinary condition of the shipping world, the great demand for vessels and the control of the Shipping Board—the idleness of the “Brazil” is peculiarly significant in determining whether the detention of the “Bayard” damaged her owners.

Mr. Kutter, of the Norwegian Pacific Line, testified that this line was the owners’ agent for handling both the “Bayard” and the “Brazil” (Ap. p. 118). He admitted that Fred Olsen & Company of Christiania, Norway, were the *managing owners* of both the “Bayard” and the “Brazil”.† That is the material factor as the cases cited hereafter show. During the whole time that the Norway Pacific Line managed these vessels on the Pacific Coast, all charters on both vessels were submitted to Olsen & Company, and it was the only party with whom the Norway Pacific corresponded.

“Q. You said that you were agent also for the ‘Brazil’, how long have you been agent for her? A. We have been agent for the ‘Brazil’ since she has been operated out here, which was about October or November, 1916.

Q. To whom have you been reporting back at that time on the ‘Brazil’? A. How do you mean reporting back?

Q. Who were her owners then? A. Our head office is Fred Olsen & Co., in Christiania, with whom we correspond.

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†And Lloyd’s Registry of Ships in its various editions so records. Mr. Kutter said the “Brazil” was not in Lloyd’s. He was mistaken. Both she and the “Bayard” are. The identity of the “Brazil” is established by the description of her given by Mr. Kutter (Ap. p. 119).—Mr. Griffiths’ questions having been specifically directed to the Lloyd’s Registry description.

Q. That is Fred Olsen & Co., Prinsengade, Christiania, Norway? A. Yes.

Q. They are the owners? A. They are the managing owners.

Q. Are they the managing owners for both the 'Brazil' and the 'Bayard'? A. Yes.

Q. And have been during all of that time? A. Yes.

Q. Did you submit to them the charters of both vessels, to Fred Olsen & Co. for approval? A. They are the only ones we correspond with.

Q. They are the only ones you correspond with? A. Yes.

Q. Do you know of any change in ownership, aside from the managing owners, during the period when you represented the 'Brazil'? A. Not to my knowledge" (Ap. p. 118).

Furthermore, the two vessels were linked together in the negotiations for their hire which finally resulted in the chartering of both. These negotiations have already been fully discussed. The court will see from a survey of the telegrams constituting these negotiations (Ap. pp. 198-208) that the two vessels were always joined together and uniformly referred to as under the same ownership. Undeniably they were under the same managing ownership which is the material consideration. The phrases, "Owners Bayard Brazil", "Owners Bayard Brazil cable today", "Agents receive word from London agents of owners" occur repeatedly in those telegrams. The charters of both vessels were finally authorized by one cable from the owners (Ap. p. 215).

Since the agency, managing ownership and actual operation of these two vessels were in the same hands,

we submit that the idleness of the "Brazil" is under the authorities evidence that the "Bayard" would have been likewise idle, apart from the collision, and that no damages for demurrage are due.

What then was the precise situation respecting the "Brazil"? What use was made of the "Brazil" during the months of November and December, 1917? She came into San Francisco harbor about ten days after the "Bayard" and, although not involved in a collision, did not leave port until about the same day as the "Bayard", January 17, 1918 (Ap. p. 120). The idleness of this vessel for a period exceeding two months in the midst of the great war, when the United States and her allies were crying "Ships! More ships!", and the issue of the war was doubtful, is eloquent testimony to the attitude of her managing owners toward the United States which was trying to get every ship to sea under fair conditions.

The telegrams of McNear and the American Asiatic Company in December (quoted in an earlier portion of this brief), offering to charter the "Brazil" and the "Bayard", show the demand for vessels of this sort in the Pacific trade. We have, of course, no record of all the charter parties offered to her owners. Mr. Smull's records show an offer from W. R. Grace & Co. in November, which was as follows:

"San Francisco, Calif. 26  
1917 Nov. 27 AM 2 40

"Chartering Committee,  
U. S. Shipping Board, Custom House,  
New York, N. Y.

Have cable advising foundering our chartered  
Norwegian steamer Thor en route to Orient and

essential we should replace this vessel to take care of homeward cargo urgently needed here stop *Norwegian motorship Brazil now ready here is offering for six months charter at sixty shillings Government form* we understand your Board will not approve charters trans-Pacific at *oncer* (over) forty-five shillings kindly advise us on this point and also advise us if it will be in order for us to charter Brazil for six months at forty-five shillings.

W. R. Grace and Co.”

(Ap. pp. 210-211.)

The Chartering Committee’s reply was not given by Mr. Smull but its general tenor is indicated in a second telegram from Grace & Co. a few days later—

“San Francisco, Dec. 6, 1917.

“Chartering Committee,

U. S. Shipping Board, New York.

Since our charter of Transvaal which you authorized Nov. 28th we have been looking for other tonnage to submit for your approval but the only suitable vessel we have found is *Norwegian motorship Brazil, and on offering this vessel forty-five shillings accordance your telegram November 27th owners replied they preferred waiting before chartering at this rate stop \* \* \**”.

(Ap. p. 213.)

The “Brazil”, it will be remembered, was finally chartered by McNear and sailed in January under the government time charter (at about the same time that the “Bayard” sailed), a trifle over two months after her entrance into San Francisco harbor. The high rates at which libelant computes the value of the “Bayard” in San Francisco at this time indicate the amount of damage which, according to *its* estimates, was sustained in *voluntarily* keeping the “Brazil” idle. Under the



circumstances, if libelant had succeeded in its claim for demurrage upon the "Bayard", it would seem unfortunate that the "Brazil" was not also in collision!

It is stated in libelant's brief that there is no evidence of attempts to charter the "Brazil" prior to December 7th (Brief p. 38). This is, of course, an oversight. The record shows Grace's telegram, dated November 27. Counsel for libelant also suggest (Brief p. 38) that the statements of third parties to the Shipping Board as to the reasons why the "Brazil" was idle are hearsay. But both the telegrams from W. R. Grace & Company (quoted above), in which this applicant for charters states that the owners of the "Brazil" are holding out for higher rates, purport to give the statements of the vessel's managers to Grace & Company and were a part of the Shipping Board's own records upon the chartering of this vessel. If these reasons are "hearsay" why did not libelant produce better evidence upon them? The case was not submitted until months after these telegrams were in evidence. If they were false, or gave fictitious reasons for her idleness, who knew and could prove their falsity better or more easily than libelant? But in the last analysis, the reasons for the "Brazil's" idleness need not be deduced from these or any other telegrams. Only one conjecture is natural. Actions speak louder than words. The idleness of the "Brazil", *unexplained by the libelant*, is more convincing than the telegrams which libelant now endeavors to disregard.

Why, indeed, did the "Brazil" remain idle?

Either she could not sail or she would not. From all the evidence in this case, it is clear that the "Brazil" was in a fit condition for sea and could have sailed during the period she remained in San Francisco harbor, if her owners were willing to use her and to charter her at government rates. They were not. Dozens of neutral vessels, like the "Brazil", lay at anchor in the ports of the United States during the winter of 1917, hoping that the Shipping Board would yield to their demands for higher rates. This has gone down into history, of which the court may take judicial notice. The "Brazil" was a neutral vessel in an American harbor at that time. Her idleness is unexplained. The fact that she was idle under all these circumstances justifies the inference that the owners of this vessel, like many other neutral owners, let the ship remain idle rather than yield to the rules of the Shipping Board.

The conclusion that the owners of the "Bayard" would have let her remain idle at this time is borne out by other facts in addition to the voluntary idleness of the "Brazil". While the liability for the collision was still undetermined and in doubt, the "Bayard" was undergoing repairs at the Union Iron Works. In the appendix to this brief, we consider the evidence concerning the method in which the repairs were prosecuted. Suffice it to say here that it will be shown that in this situation, the owners, uncertain whether they would have to pay the labor bills themselves, used neither double shifts nor overtime, so that the repairs were not completed until forty-eight days after the

collision. *This period could have been reduced materially.*

Furthermore, the vessel did not sail until the middle of January, three weeks or more after the repairs were completed. On this libelant's counsel has suggested that no definite plans could be made until the vessel's repairs were completed (Ap. p. 37, Brief p. 39). But the record, common sense and business judgment show otherwise. The offers received for chartering the ship did not specify any particular delivery date; ships were needed, and these charterers did not quibble over the exact date when the "Bayard" would be delivered to them. If the owners were willing and eager to charter their ships, why did they delay her completion, and also postpone negotiations for her charter, so that a further delay of three weeks was necessary after she was ready for sea? One answer, and only one, can be given. Uncertain whether or not they would themselves have to pay for the repairs, they saw no reason for incurring additional expense in expediting them, when they intended to keep the ship idle in any event. They had another vessel at hand and idle, permitted rates were lower than they wished to accept, and by holding out on both vessels they might in the end get a higher rate from the Committee. If eventually the respondent could be made to pay for the detention, so much the better.

*By reference to the Appendix, point D, it will be seen that the repairs on the "Bayard" dragged from November 3rd to December 21, 1917. In this period there were six Sundays and a holiday on which no work was done. Libelant claims that the "Bayard" was*

*worth \$4215 a day. At the time of the repairs liability for the collision was undetermined. Is it conceivable that if this was her real value and libelant intended sending the "Bayard" to sea it would have allowed the repair work to stop for seven days at a loss of \$4215 a day—\$29,505?*

This inference is irresistible. We cannot put it better than the learned Judge of the District Court did in his opinion.

“While the ‘Bayard’ was laid up for repairs the ‘Brazil’ was also idle in port although there was a great demand for ships and she could have sailed at any time at the rates fixed by the Board. The fact that she did not do so leads me to believe that the owners were unwilling to accept these rates, and preferred to wait in the hope or expectation of securing a more profitable figure. They were in fact unwilling to accede to the regulation of the Shipping Board in regard to rates, and seemingly desired to take their chance of getting higher rates later by leaving the ship idle during this period. If it were not for the voluntary idleness of the ‘Brazil’ I would allow demurrage to the ‘Bayard’ at the rate of forty-five shillings per deadweight ton per month for the period of thirty-four days. But as the owners preferred to leave the ‘Brazil’ idle when she could have been chartered at these rates, it is reasonable to conclude that they would not have accepted them for the ‘Bayard’ had she been in commission.”

We discern in libelant’s brief no effective answer to these findings. There is some general suggestion that the presumption of law is against a tortfeasor, but as we have already shown, there is no such presumption in the sense contended, viz.: that libelant is relieved



of the burden of proving its damages. It is also suggested that the two vessels were owned by different corporations. But the managing ownership was the same for both of them and under *The Loch Trool*, 150 Fed. 459, even identity of management (to say nothing of managing ownership) warrants the court in drawing the conclusion that when one vessel is idle under similar circumstances, the other probably would be also. A managing owner is under the general maritime law, either a majority owner himself or a representative of the majority and as such operates the vessel for all of her owners. Unless in some way the control of the managing owner is definitely fettered by the other owners, his management of the vessel is untrammelled.\* A managing owner is substantially a controlling owner. Here we have, first, identity of the managing ownership of the "Bayard" and "Brazil"; second, facts showing that both vessels were actually managed by this managing owner; third, nothing to show that his discretion was, so far as the "Bayard" was at any rate concerned, subject to any restrictions; fourth, actual discretion exercised on the "Brazil" to keep her idle during November and December, 1917, rather than sail her at Shipping Board rates. The "Brazil" was a vessel of the same type, in the same trade and in the same harbor as the "Bayard". The court we think very reasonably drew the inference of fact that the managing owner would have exercised his discretion with respect to the use of the "Bayard" in the same

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\*See definitions of managing owner in

*The Wm. Bagley*, 5 Wall. 377; 36 Cyc. 31, 36;  
25 Am. & Eng. Ency. of Law 886; 26 Cyc. 124.

way as he exercised it in regard to the "Brazil". If in fact the managing owner of the "Bayard" did not have the same discretion in the operation of the "Bayard" as he had in the operation of the "Brazil" no one was in as good a position as the libelant to show that he did not, but no proof along those lines was offered and the record shows, it seems to us irresistibly, that the two vessels were grouped and handled together. After hearing and seeing all the witnesses whose testimony bears on the point, the trial court drew the inference that Fred Olsen & Company as the managing owner of the "Bayard" and the "Brazil" would have handled the "Bayard", had she been in commission, as they did the "Brazil", that is would have left her idle in San Francisco harbor during November and December, 1917, rather than yield to the Shipping Board rates of charter.

*A shipowner who would not have used his vessel in any event is not damaged by the loss of her time while repairs are being made.*

The rule of

*The North Star*, 151 Fed. 168,

applies. That was a case, it will be remembered, in which damage was claimed for the time during which one of a fleet of vessels was laid up for repairs. At the time she was injured, cargoes were being offered to the libelant's other vessels, but were refused because of the approach of winter, and one by one these vessels were being laid up for the season. It was held that no damage in fact was sustained by the North Star's detention since the reasonable inference was that the

opportunity for using the vessel would have been rejected, the rule being—

“But if it appears affirmatively, or if the reasonable inference from the facts established is, that there was no opportunity or that he (the owner) would have rejected the opportunity, if offered, it is impossible for a court or jury to find legitimately that he had sustained actual loss.”

So in

*The Glencairn*, 78 Fed. 379,

the libellant's vessel, the “Bedfordshire”, was injured in a collision in Astoria harbor for which the claimant admitted liability. Claim was made for damages on account of loss of time during the period of repair. The evidence showed that she was in the harbor for a month before the collision and had declined charters at the market rate. Judge Bellinger gave damages in the amount tendered by the respondent for the physical damages, and disallowed the claim for demurrage.

(p. 383):

“I cannot allow damages based upon the claim that the Bedfordshire was kept out of the market by reason of her injuries. The Bedfordshire was held for higher charters than were offered, and the market was a falling one. She was in the harbor nearly a month before the collision, and had declined offers for her charter as high as 35 shillings. She was, according to the testimony of Mr. Sibson, being held above the market. It is claimed that, at the date of the collision, and following, she was worth 32s. 6d.; but the testimony tends to show that she was held above that figure, and that the market continued to decline. She is not entitled to recover from the Glencairn the value of the market which she refused. She was

not an exception in this regard. Other vessels equally valuable declined charters in the state of the market, and remained in port after the Bedfordshire had completed her repairs."

Similarly, in

*The Loch Trool*, 150 Fed. 429,

it was held that the unexplained fact that another vessel *under the same management* and engaged in the same trade was permitted to lie idle for months after the collision supported the conclusion that the owners of the injured vessel were not damaged by her enforced detention.

The decision in the last case is directly applicable in the case at bar. Either the war, or shipping conditions under government control at government rates, made the owners unwilling to use the "Brazil" during the months of November and December, 1917. She was a vessel of the same general type as the "Bayard" and engaged in the same trade. She was *under the same management*. The only "reasonable inference from the facts established" is, that in view of the voluntary idleness of the "Brazil" at the very time the "Bayard" was being repaired, the detention of the "Bayard" did not damage her owners and that an award of demurrage for the period of her detention, far from *compensating* them for damages, would be an award of profits, which would not have been gained had the collision never occurred.

We ask attention again to the decision in

*The Winfield S. Cahill*, *supra*,

where it was held that the owners of a vessel which,



soon after the collision, was "blacklisted" by the Shipping Board, could not recover demurrage at her chartered rates. In other words, since they would not have used the vessel in any event, they were not damaged by her loss of time.

*The rule of restitutio in integrum is intended to indemnify for injuries actually suffered, and not to award earnings which would never have been made. It is a canon of restitution, not of enrichment.* We submit that the long-continued idleness of the "Brazil", the delay in arranging for a charter of the "Bayard", and in getting her off to sea after she was repaired, lead to but one reasonable inference of fact which is contradicted by nothing in the record. *The "Bayard" would have been kept idle, as the "Brazil" was kept waiting, to see whether by some turn of events the owners would become free to use their ship without governmental interference.* The collision interfered in no way with the owners' use of the "Bayard"—they were not damaged on the score of detention by having her laid up for repairs.

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It clearly seems to us, as we have urged, that the burden of proof so called is with libellant to show its loss with reasonable certainty. It seems to us further, as we have also urged, that regardless of the burden the evidence in the record shows that the "Bayard" would not have been employed even if the collision had not occurred. But even if (as we do not think is at all the situation) the case were left in equipoise, libellant would fail for the burden of proof in the true sense

is always with the moving party and on it rests the risk of non-persuasion.

*Crowley Launch and Tugboat Company v. United States Shipping Board Emergency Fleet Corporation, et al.* (Case No. 3846 on the records of this court, decided June 19, 1922, but not yet, we believe, in the Federal Reporter.)

We venture to suggest that it "appears affirmatively" to use the language of the Circuit Court of Appeals for the Second Circuit in the *North Star*, *supra*, that there was "no opportunity" to charter the "Bayard" at the rate of the Moore charter and that libellant "would have refused the opportunity" at permitted Shipping Board rates. Those were the findings of the District Court. If they did not "appear affirmatively", at least they were (to use again the language of the *North Star*) "the reasonable inference from the facts established".

*"But if it appears affirmatively, or if the reasonable inference from the facts established is, that there was no opportunity or that he would have refused the opportunity if offered it is impossible for a court or jury to find legitimately that he has sustained actual loss."* (Italics ours.)

*The North Star*, 151 Fed. 168 at 175.

## II.

**THE FINDING OF THE DISTRICT COURT UPON CERTAIN DIS-  
PUTED ITEMS OF ALLEGED DAMAGE NOT INCLUDED IN  
THE STIPULATED PHYSICAL DAMAGES SHOULD BE AF-  
FIRMED (Ap. pp. 307-313).**

We stipulated with libelant to the physical damages at \$58,096.15. Libelant claimed also the following items which we disputed, and the parties submitted them to the court's determination (Ap. pp. 309-310).

For Watchman T. Pentland on the "Bayard" from November 3rd to December 21, 1917; 49 days at \$3.50 per day.....	\$ 171.50
For Watchman Chas. Bergk on the "Bayard" from November 3rd to December 21, 1917; 49 days at \$3.50 per day.....	171.50
For 3 tons of coal for cooking while the "Bayard" was laid up for repairs at \$15.25 per ton .....	45.75
For wages for 30 men (members of the crew of the "Bayard") during the period of repairs, November 3rd to December 21, 1917; 49 days at \$85.00 per day.....	4165.00
For victualling of said 30 men during said period of repairs, from November 3rd to December 21, 1917; 49 days at \$30.00 per day .....	1470.00
Total .....	<hr/> \$6023.75

The court by its order (Ap. p. 311) and final decree (Ap. p. 311) disallowed these items.

Appellee protests (Brief, p. 49) that it fails to understand upon what theory. With the case decided as it was we have frankly never been able to understand on what theory libelant claimed these items. They are for expenditures for watchmen, for wages of the

“Bayard’s” crew, for the victualling of that crew and for coal used in cooking—all during the period November 3rd to December 21st, 1917, when the “Bayard” was under repair after the collision. The court in its opinion found that the “Bayard” would have been idle during this period of repair regardless of the collision and that libelant was consequently not entitled to demurrage. It follows, therefore, that the foregoing expenses were not imposed upon libelant by the collision. They would have been incurred any way. The rule of damages in collision cases is *restitutio in integrum* and that rule does not require that the claimant should reimburse libelant for expenditures which were not caused by the collision.

We respectfully submit that the decree should be affirmed both in respect to the disallowance of demurrage and of the disputed items above mentioned. If the court should come to a different conclusion we ask reference to the appendix for determination of the amount of demurrage.

Respectfully submitted,  
 FARNHAM P. GRIFFITHS,  
 McCUTCHEN, OLNEY, WILLARD, MANNON  
 & GREENE,

*Proctors for Appellee.*

(APPENDIX FOLLOWS.)



## **Appendix.**



## Appendix

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### CONSIDERATIONS WHICH ARE IMMATERIAL IF THIS COURT SHOULD AFFIRM THE DECREE OF THE DISTRICT COURT THAT NO DEMURRAGE IS RECOVERABLE.

These considerations become material only if this court should take a different view of the case and award demurrage, in which event they should be referred to in fixing the amount.

#### A.

If contrary to the finding of the District Court this court should hold the "Bayard" entitled to demurrage the damages therefor should not exceed her net earning power at the approved Shipping Board rate as this was her market value at the time.

#### B.

Damages for demurrage, if allowed at all, should not only be restricted to net earnings under the forty-five shilling rate (point A *supra*) but, as the trial court said, should be computed for thirty-four days only,—not for forty-eight days; the full period of repair, November 3rd to December 21st, as claimed by libelant. The "Bayard" had only just finished discharging her inward cargo when the collision occurred; the approval of the owners in Norway for new employment had to be secured by cable; and such cable approval could not have come in less than fourteen days. Regardless of the collision, therefore, the vessel would have been idle for fourteen days after November 3rd. If by any chance

damages should be based on the Moore charter, as claimed by libelant, the same reduction of days should be made because Mr. Moore made his offer only just prior to the collision, and cable approval had to be secured from Norway.

### C.

The damages for demurrage, if any are allowed, computed at the forty-five shilling rate (Point A, *supra*) for a period of thirty-four days (Point B, *supra*), should be further reduced by allocating at least one-third thereof to the owner's (libelant's) account; so also if damages should by any chance be based on the Moore charter. This contention rests on an established rule both of American and English law where, as in this case, substantial repairs *not* necessitated by the collision are made simultaneously with those which *are* so necessitated.

### D.

Libelant used neither overtime nor double shifts in repairing the "Bayard", therefore repairs were not prosecuted diligently for the mitigation of damages if the value of the "Bayard's" time runs into the enormous figures asserted by libelant. If damages should be awarded on the basis of the Moore charter there should be a reference to the Commissioner for computation of the saving that would have been made by diligent prosecution of the repairs. But this consideration is material only in the event of a reversal of the decree *in toto*.



## A.

IF CONTRARY TO THE FINDING OF THE DISTRICT COURT THIS COURT SHOULD HOLD THE "BAYARD" ENTITLED TO DEMURRAGE, THE DAMAGES THEREFOR SHOULD NOT EXCEED HER NET EARNING POWER AT THE APPROVED SHIPPING BOARD RATE AS THIS WAS HER MARKET VALUE AT THE TIME.

The conclusion of the District Court was that libelant is not entitled to any damages for demurrage because, failing to have the Moore charter approved, it would have kept the "Bayard" idle in San Francisco Bay rather than send her out at the only rate which could have received the approval of the United States Shipping Board. That basic rate was, as we have shown, always insisted upon and constituted the *sine qua non* of every charter party, whatever discussion there might be by the Chartering Committee as to other details (Ap. p. 231). We have urged in the main body of this brief that the District Court was correct in disallowing any demurrage and that its decree to that effect should be affirmed. We now urge here that if the District Court should be found to have erred in denying demurrage, it was nevertheless correct in finding that the market value of the vessel, had her owners been willing to sail her instead of keeping her idle, was fixed by the time charter rate approved by the United States Shipping Board. Counsel for libelant admitted that damages for demurrage must be based on the market value of the vessel.

*The market value of neutral vessels in American ports in November and December, 1917, was not determinable by the law of supply and demand but by the war regulations of United States government. Under war regulation the value of the "Bayard's" time was*

*her net earning power at forty-five shillings per deadweight ton per month, and no more.*

We do not controvert the rule discussed fully by libelant's counsel that the market value for the use of a ship governs the amount to be awarded as damages, and that the shipowner, if entitled to recover at all, is entitled to recover at this market value when ascertained. But we disagree with counsel as to what the market value of the "Bayard" was at the time in question. They claim that the market value was determinable by the usual law of supply and demand, and that therefore the offer of the Moore Charter for \$400,000, lump sum, fixes the "Bayard's" market value—this in the face of the evidence that neutral vessels from early in October, 1917, were permitted to sail from American ports only with the approval of the United States Shipping Board and at the maximum rate fixed and enforced by the Board, namely forty-five shillings per deadweight ton per month. The market value of the vessel had her owner not chosen to keep her idle was her earning power at that rate.

This collision occurred in the midst of the greatest war in history, at a time when governments here and in Europe were exercising extraordinary powers of control over matters not ordinarily subject to governmental authority. Under these conditions market value was not determinable by the same factors as in times of peace. The market price of the use of a vessel, like the price of sugar or flour, is regulated in ordinary times by the law of supply and demand, and this is the price, "market price according to supply and demand", according to

which the libelant declares his damages are to be reckoned. But war crises and war conditions brought into existence a new factor in determining the value of a ship. This was a governmental body which, regardless of limited supply and overwhelming demand, fixed rates according to certain policies. We need not here chronicle the rise of freight rates during the three years preceding the entrance of the United States into the World War, but the exorbitant prices and the vast profits of shipowners in the spring of 1917 can be judicially noticed by this court. That upon the entrance of the United States into the World War the long arm of the United States Shipping Board reached out to curb these profits and that within a few months it succeeded in reducing the current "market rate" of ships over forty per cent—these are matters of history and are in this record (Ap. p. 217). Libelant, in effect, is demanding a profiteering market price for the hire of its vessel during the months of November and December, 1917. But that price no longer depended on the individual wishes of the owner and those who desired to charter his ship, for the assent of the United States Shipping Board was then necessary to the legality of the price proposed. The old law of "market price according to supply and demand" is not the basis for computing the value of the "Bayard". The multiplier of ordinary times is changed to a divisor. "Market price according to supply and demand" has given place to "market price as permitted by law".

Under these circumstances the offer of the Moore charter meant nothing. In ordinary times libelant might have met its burden of proof respecting the damage sustained by the loss of the vessel's time

by showing that just prior to the collision, Mr. Moore had offered to charter the "Bayard" for \$400,000.00. But this offer did not occur in ordinary times. It was made at a time when the United States Shipping Board, under ample authority, had assumed control of neutral vessels in every port under American dominion, and that Board's approval was necessary for all chartering or berthing of vessels, and its authority could be enforced by refusal of fuel supplies or clearance to neutral vessels until the approval was secured. The Moore offer was necessarily made subject to the approval of the United States Shipping Board. Mr. Moore, who made the offer, so testified (Ap. p. 20) and Mr. Kutter, the agent in San Francisco for the "Bayard", proposed to submit this very charter to the Shipping Board.

"Q. You proposed to submit this particular charter with Mr. Moore to the Shipping Board, didn't you? A. We did.

Q. And you understood that you would have to have the approval of the Shipping Board of that charter before the vessel could sail? A. That was the general understanding, that all the charters were to be submitted to the Shipping Board for their approval.

Q. And that any charter, except one for your own account, would have to be submitted to the Shipping Board for approval? A. If I remember correctly that is the way it was" (Ap. pp. 121-122).

In these circumstances, as we have said, the *offer* of the charter meant nothing. The approval of the Shipping Board was the all important factor and, that approval, as has been shown in the main argument, could not possibly have been given to any charter



whatever its form, which as to rates was in excess of the basic rate prescribed and uniformly insisted upon as the *sine qua non* of all charters of neutral vessels (Ap. p. 230).

Suppose a railroad carrier sued a shipper for accrued freight charges, could it be argued that the law of supply and demand would govern the amount to be awarded? That the price agreed on between the parties should control the judgment! Assuredly the answer would be that this is a matter no longer subject to the law of supply and demand or to private agreement, and that the tariff fixed by the Government is controlling. Or to illustrate further. During the war the United States Food Administration fixed the prices of many of the staples of life which were ordinarily not any more subject to governmental control than the rate of hire of a ship. Could a seller of sugar bring suit to recover a price higher than the scale prescribed by the Government, presenting in support of the same an offer to purchase at the higher rate? In the case of the carrier and in the case of the sugar seller the law of supply and demand and of private contract would give way to the prices fixed by the Government.

So in this case, where the evidence is indisputable that the market hire of a vessel was no longer governed exclusively by the will of the owner and the charterer, but had to receive the assent of the Chartering Committee of the United States Shipping Board, and where the evidence is further that that assent would under no conditions be given for the period in question to a rate higher than the basic rate, the burden is on libelant

to show that the \$400,000.00 Moore charter is within that rate. That burden, as we have pointed out, libelant has failed to sustain, not only to a reasonable certainty but to any certainty at all. And apart from burden of proof, the evidence is positive that under the Moore charter libelant would have earned more than double what he could have earned at the basic rate.

*The Winfield S. Cahill*, 258 Fed. 318,  
is decisive of the point and confirms the foregoing reasoning.

The "Seguranca" was injured in a collision and had to be laid up for repairs. As the vessel was under charter at the time of the collision, her owner demanded demurrage at the charter rate. It appeared in evidence that the charter had not yet received, and would not have received the assent of the governmental authorities, in as much as she had been "black listed" by the Shipping Board. It was held that there was no reasonable probability that she would have earned her charter hire. Damages for detention were refused. In other words, the owner, although he proved the charter rate, could not show that it would have been approved. This case is one of the most recent upon questions of demurrage, and is also the first in which the question of governmental control, in its bearing upon demurrage claims, has been involved. We submit that the decision is controlling for this case.

Accordingly, the trial court expressed the view that damages if allowable at all would have been computed on the basis of the Shipping Board rate, namely forty-

five shillings per deadweight ton per month. The net earning power of the "Bayard" at this rate was \$1650.40 per day (see page 59 *supra* where the computation is given).

The number of days for which demurrage should be allowed if at all is considered under the next heading.

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### B.

**DAMAGES FOR DEMURRAGE, IF ALLOWED AT ALL, SHOULD NOT ONLY BE RESTRICTED TO NET EARNINGS UNDER THE FORTY-FIVE SHILLING RATE (POINT A, SUPRA) BUT, AS THE TRIAL COURT SAID, SHOULD BE COMPUTED FOR THIRTY-FOUR DAYS ONLY,—NOT FOR FORTY-EIGHT DAYS. THE FULL PERIOD OF REPAIR, NOVEMBER 3rd TO DECEMBER 21st, AS CLAIMED BY LIBELANT. THE "BAYARD" HAD ONLY JUST FINISHED DISCHARGING HER INWARD CARGO WHEN THE COLLISION OCCURRED; THE APPROVAL OF THE OWNERS IN NORWAY FOR NEW EMPLOYMENT HAD TO BE SECURED BY CABLE; AND SUCH CABLE APPROVAL COULD NOT HAVE COME IN LESS THAN FOURTEEN DAYS. REGARDLESS OF THE COLLISION, THEREFORE, THE VESSEL WOULD HAVE BEEN IDLE FOR FOURTEEN DAYS AFTER NOVEMBER 3rd. IF BY ANY CHANCE DAMAGES SHOULD BE BASED ON THE MOORE CHARTER, AS CLAIMED BY LIBELANT, THE SAME REDUCTION OF DAYS SHOULD BE MADE BECAUSE MR. MOORE MADE HIS OFFER ONLY JUST PRIOR TO THE COLLISION AND CABLE APPROVAL HAD TO BE SECURED FROM NORWAY.**

The District Court disallowed demurrage but said that if it had been recoverable the period of allowance should be 34 days only. We submit that that conclusion was correct.

The "Bayard" finished discharging her inward cargo on the afternoon of November 3rd and the collision occurred two hours afterward (Ap. p. 18). Assuming the local agents to have opened immediate communications with Norway for permission to charter the vessel at the Shipping Board rate, it would have taken two weeks for a reply to come. Mr. Kutter, San Francisco agent for the "Bayard", testified:

"Q. It would take you a couple of weeks to get cable communication with Norway, wouldn't it?

A. When we cabled for authority to charter, yes" (Ap. p. 117).

The District Court, we think, very properly said that if damages for demurrage should be awarded to libelant on the basis of the "Bayard's" then market value (forty-five shillings per deadweight ton per month), the computation should be not for forty-eight days (November 3rd to December 21st, 1917), during which the "Bayard" was under repair, but for thirty-four days at the outside, as two weeks would necessarily have been required before a proposed charter could have been approved.

Similarly, if perchance the court should uphold libelant's contention that the damages should be based upon the Moore charter, the computation should be for thirty-four days instead of forty-eight. Mr. Moore's negotiations with the San Francisco agents of the "Bayard" were had "just prior to November 3rd with respect to the chartering of the motorship "Bayard" (Ap. p. 18). His offer of the \$400,000 charter was made at that time (Ap. p. 19) and apparently the San Fran-



cisco agent had not, or had only just, cabled to Norway on it (Ap. p. 19). Two weeks, as pointed out above, would have been required for an answer (Ap. p. 117) and the charter could not have been executed before the authority came (Ap. p. 115).

The amount found due for the thirty-four days on either basis (Shipping Board rate or Moore charter) is subject to the further deduction on account of owners' concurrent repairs discussed under Point C *infra*; and in the possible event of damages based on the Moore charter there should be the further deductions for failure to diligently prosecute repairs, discussed under Point D *infra*.

These deductions and indeed the calculation of demurrage generally, if this court should take such a view of the case as to make any demurrage recoverable, will, it may be assumed, go to a reference in the usual way after the mandate goes down to the court below, and, therefore, we do not go into figures here.

In

*The Saginaw*, 95 Fed. 703,

a passenger vessel injured in a collision was delayed three days for necessary repairs. It appears that despite this delay the vessel completed her voyage to Hamburg in ample time for her scheduled return seven days later. The referee allowed damages for this period, but on exceptions to his report the court disallowed the claim for loss of the use of the vessel, holding that compensation for this period, when no actual damage was shown, was not within the rule of *restitutio in integrum*.

This deduction is comparable to that made by Judge Morrow in

*The Rickmers*, 142 Fed. 305,

where the injured vessel was laid up for repairs for ninety days. The rate of demurrage was based upon the net earnings of the vessel during a voyage of sixty days. It was held that for every voyage of sixty days there would have been an average of fourteen days in the ports of loading and unloading and that such period ought to be deducted from the total number of days during which the ship was laid up for repairs. The respondent paid demurrage on seventy-four days only instead of ninety days as claimed by libellant.

Under the authority of this case the claimant herein should not be charged demurrage rates for the interval of two weeks during which the agents would have been obliged to keep her idle awaiting instructions for the Norwegian owners.

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### C.

THE DAMAGES FOR DEMURRAGE, IF ANY ARE ALLOWED, COMPUTED AT THE FORTY-FIVE SHILLING RATE (POINT A, SUPRA) FOR A PERIOD OF THIRTY-FOUR DAYS (POINT B, SUPRA) SHOULD BE FURTHER REDUCED BY ALLOCATING AT LEAST ONE-THIRD THEREOF TO THE OWNER'S (LIBELANT'S) ACCOUNT. SO ALSO IF DAMAGES SHOULD BY ANY CHANCE BE BASED ON THE MOORE CHARTER. THIS CONTENTION RESTS ON AN ESTABLISHED RULE BOTH OF AMERICAN AND ENGLISH LAW WHERE, AS IN THIS CASE, SUBSTANTIAL REPAIRS NOT NECESSITATED BY THE COLLISION ARE MADE SIMULTANEOUSLY WITH THOSE WHICH ARE SO NECESSITATED.

The District Court found that repairs not necessitated by the collision were carried on with those so

necessitated—in other words, found the fact—but concluded it to be an immaterial feature in the view that the court took of the case, namely, that no demurrage was due. It becomes material only if demurrage should be allowed.

While the repairs necessitated by the collision were under way, the owners made extensive repairs on their own account which had nothing to do with the collision. The repairs thus made by the owners on their own account were substantial and of benefit to the ship. The dynamos were “stiffened up”, new foundations were installed under the auxiliary engines, repairs were made on pipes, the cylinders were opened up and new piston rings were fitted in; the cross-head brasses were refitted and the crank pin brasses examined, the engines overhauled and accumulated dirt and grease removed, in addition to a variety of smaller jobs. Testimony on these repairs was given by the surveyors Mr. Blackett (Ap. p. 260) and Mr. Evers (Ap. pp. 276-277) and by Mr. Siversen, General Superintendent at the Union Iron Works (Ap. pp. 293-296). All these repairs were for the owner's account and none of them, not even the overhauling of the engines, were necessitated by the collision.

The importance of these repairs and the length of time taken in making them can be estimated by the size of the Union Iron Works' bill. This was approximately \$20,000.00, although a great part of the work in overhauling the engines was done by the engineers and crew of the vessel and their work of course was not included (Ap. p. 295).

While two sorts of repairs are going on simultaneously for the account of two different persons, justice requires a division of the common expenses. And that is the rule. Both American and English courts apportion the value of a vessel's time when both the owner and a *tort feasor* are repairing her while she is laid up.

In

*The Sequoia*, 132 Fed. 625 (9th Cir.),

the "Cleveland" was laid up for ten or eleven days for repairs due to a collision with the "Sequoia". The owners made other repairs not necessitated by the collision but of a substantial character and of benefit to the steamer. *They did not interfere with or delay the repairs resulting from the collision. Nevertheless, Judge De Haven held that the owners could not recover demurrage for the whole period but that the value of the use of the ship for the period of detention should be divided.*

"The owner is entitled to demurrage for the time that the vessel is necessarily detained while undergoing such repairs; that is, he is entitled to the value of the use of his ship during that period. But manifestly, this rule would not be just under the peculiar circumstances of this case, because a portion, if not all, of the time she was delayed on account of the collision, the 'Cleveland' was undergoing other repairs which were beneficial to her. *It may be that these repairs would not have been made at that time except for the fact that the steamer was under detention because of the injury received by her in the collision with the 'Sequoia', but, nevertheless, the repairs made were substantial, and must have had to have been made in the near future. To allow the owners of the 'Cleveland' to recover the entire value of her use during the*



*time they were made would really place them in a better position than if the collision had not occurred."*

The principle thus recognized by Judge De Haven was followed in

*The John F. Gaynor*, 124 Fed. 743; 130 Fed. 856, where it was held that the cost of a survey occasioned partly by damage done by collision and partly by stress of weather must be apportioned between the owner and the respondent.

Similarly, in

*The Bratsberg*, 127 Fed. 1005, it appeared that repairs not necessitated by the collision were made at the same time as the collision repairs. It was held that this required a division of the cost of the survey and the docking charges.

"But I think that the cost of the survey and the docking charges ought to have been divided. Other repairs not made necessary by the stranding were made at the same time and the English rule which divides the charges under such circumstances seems to be fair and equitable. (*Marine Ins. Co. v. China Steamship Co.*, 6 Asp. M. C. 68, 11 App. Cas. 574; *Ruabon v. London Assurance Co.*, 8 Asp. M. C. 346) and it was followed in this district in the unreported case of the *Atlas v. Le Lion* No. 77 of 1895."

The leading English case (cited in *The Bratsberg*, *supra*) is the case of

*Marine Insurance Co. v. China Transpacific S. S. Co.*, 11 App. Cas. 573.

The "Vancouver" sustained a fracture of her stern-post by perils of the sea but this damage was not dis-

covered until the ship was put in drydock by the owner to be cleaned, scraped and painted. The ship was discharged in eight days, the cleaning, etc., being completed in the first three days, whereas the repair of the stern-post required the whole eight days. The question then arose whether the drydock charges for the first three days ought to be apportioned between the owner and the insurer, for, if it was, there would be a particular average loss within the policy of insurance. It was held that the drydock charges for the period during which the ship was being cleaned and painted should be apportioned between the owner and the insurer. Lord Justice Fry states the reason for the rule:

“Now, although it is quite true that the insured are carrying on the two operations, together, yet they may fairly be treated as if they were separate persons, because the insured are carrying on one operation at their own expense and risk, and they are carrying on the other operation with a right to be indemnified by the underwriters.

Where the circumstances are such that there are two persons, one of whom has a distinct object in view, which he can only accomplish at a certain expense, and if both of these persons concur together, they can each accomplish their separate object at the same expense as would have been incurred by each of them if they had done it separately, there it appears to me, the simple ordinary rule—the rule of justice and equity—is, that the total expense which has been incurred in their doing their acts together, and which would have been incurred by each if they had done it separately, shall be divided between them. This appears to me to be one of the cases in which the well known maxim, ‘Equality is equity’, applies.”

The authority of this rule was recognized in the case of

*Ruabon S. S. Co. v. London Assurance Co.*,  
(1897) 2 Q. B. 456; 1900 App. Cas. 6.

Here the shipowner took advantage of the ship's presence in drydock for repairs to have her surveyed for the purpose of reclassification in Lloyd's. The insurers contended that the shipowner was bound to contribute to the expense of the drydocking as he had derived material benefit therefrom. Justice Mathew held that the cost should be divided equally. On appeal he was reversed and it was held that the insurer must pay the whole dock charge. The rule on which we are insisting was, however, recognized; the reversal was on its application to the facts. The case of

*Marine Insurance Co. v. China Transpacific Co.*,  
*supra*,

was distinguished because in it both operations were essentially necessary to the ship, whereas in the "Ruabon" case reclassification was not necessary at the time as the existing classification had nine months more to run. Under the American rule, as we point out later, the distinction is immaterial; all that is required for apportionment of the demurrage is that the repairs for owner's account shall have been of substantial benefit to the vessel and this was undeniably the fact in the instant case.

In

*The Acanthus*, 85 L. T. (N. S.) 696,

a collision between the "Acanthus" and the "Bohemian" made it necessary to put the "Bohemian" in

drydock for repairs. Although she was a new ship, the owners had been contemplating putting in new bilge keels before the collision, and therefore decided to do it while she was in drydock. Putting in the new keels did not retard the repairs. The owners of the "Acanthus" urged that the docking and demurrage charges should be divided. Justice Jeune thought that the case came under the rule of the "Ruabon" case, *supra*, instead of that of the Marine Insurance case, but was of the opinion that if the new keels had been necessary, the charges should have been divided.

"But perhaps it only comes to this, that where there is an obligation, or where the cases arises that the vessel has to be repaired—or to use Lord Brompton's phrase, where there are two things necessary to be done one by one person and one by another—if they are done at the same time then the cost, so far as it is common to both, may well be shared by them. But the point is that two things are obligatory by reason of contract or duty. I can easily understand if it had been shown in this case, that the bilge keels were a necessity and the vessel could not go to sea without them, it might be said that the owner was under an obligation to fit them, and if he had been under any obligation, and if, at that time he had put the vessel into drydock, it might be said it was as much on his own behalf as on behalf of the owners of the 'Acanthus'."

The "Acanthus" was the case cited by Judge De Haven in

*The Sequoia*, *supra*.

He disapproved the distinction followed in the "Acanthus", however. The test which he applied as the American rule was whether the repairs were sub-



stantial and of benefit to the vessel. If so, equity, in his opinion, required a division of the demurrage charge.

*In the case now before the court repairs made for the owner meet the requirements of both the American and the English judges. They were substantial and of benefit to the vessel within Judge De Haven's rule and many of them were necessary for the safety of the "Bayard" as required in the later English cases. The law requires therefore an apportionment of the claim for demurrage between the libelant and the claimant.*

If this matter of a deduction on account of concurrent owners' repairs becomes material, its amount, we suppose, will be referred for determination to the Commissioner in the usual way. Suffice it to say here that the deduction is and will be a matter of real moment if demurrage is to be allowed, as the repairs for owners' account aggregate some \$20,000, and the total stipulated physical damages for which we are responsible are only \$58,096.15, so the deduction should be somewhere in the neighborhood of a third of the demurrage.

## D.

LIBELANT USED NEITHER OVERTIME NOR DOUBLE SHIFTS IN REPAIRING THE "BAYARD". THEREFORE THE REPAIRS WERE NOT PROSECUTED DILIGENTLY FOR THE MITIGATION OF DAMAGES IF THE VALUE OF THE "BAYARD'S" TIME RUNS INTO THE ENORMOUS FIGURES ASSERTED BY LIBELANT. IF DAMAGES SHOULD BE AWARDED ON THE BASIS OF THE MOORE CHARTER THERE SHOULD BE A REFERENCE TO THE COMMISSIONER FOR COMPUTATION OF THE SAVING THAT WOULD HAVE BEEN MADE BY DILIGENT PROSECUTION OF THE REPAIRS. BUT THIS CONSIDERATION IS MATERIAL ONLY IN THE EVENT OF A REVERSAL OF THE DECREE IN TOTO.

The authorities.

In

*The Fannie Tuthill*, 17 Fed. 87,

the court said:

"The right of the injured party to be indemnified for the loss of the use and service of his vessel during the period required for making his repairs is also recognized; *but it should only include the minimum time required for that purpose*, and this should fall wholly within the season of navigation, or within which, but for the injury, his vessel could have been profitably used."

Cheap methods of repair at an unjustifiable expenditure of time were condemned in

*The Sovereign of the Seas*, 139 Fed. 812.

Libelants had certain repairs to a barge made at a cost of \$882.92. The sum of \$1485 was demanded for the thirty-three-day detention for the repairs. The barge was not, as she could have been at saving of time, put in drydock or on a marine railway. The repairs

were cheaply done but at a considerable loss of time. It was held that libelants were not entitled to the sum they claimed.

“While it may be doubtless true that this method of doing the work was cheaper, it does not follow that it could not have been performed more expeditiously, and it is with the matter of the time it took to do the work that we are now dealing. The libelants reiterate the fact that they were economical in making the repairs, because they did not know at the time on whom the loss would fall, as the fault of the collision had not been settled,\* but it by no means appears that they were in a hurry in doing the work, as they might not at that time have been busy with their barge; and if they could be allowed full demurrage for all the time consumed by the slow method adopted of doing the work it would result in quite a remunerative plan of doing business. They are not entitled to and should not receive demurrage for any such length of time as is charged here upon any principle upon which allowances of that character are made.”

Similarly, in

*Columbia Dredging Co. v. Brooks Co.*, 163 Fed. 362,

the court commented upon a demand for fifty-one days' loss of time at \$17.12 per day, whereas the cost of the work covering the same period was \$9.12 a day, as “giving the respondent a handsome bonus for keeping the scow in the repair shop, instead of in the water”.

So the authorities run. We next consider their application to the case before us.

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\*This was the situation in the case at bar when the repairs for the collision were being made. Liability for the collision was then in issue.

### **The situation in the case at bar.**

Repairs on the "Bayard" were commenced November 9th and completed December 21st, 1917,—43 days (Ap. pp. 259, 261, 262). Straight time only was used except for three days' overtime on the drydock (Blackett, Ap. p. 260). There are two devices by which many days' time could in such circumstances have been saved: first overtime (sometimes called the double shift,—see, for instance, Blackett, Ap. p. 260), that is to say, continuing the same day crew at work into the night; second, two separate shifts of men, one working by day and the other by night (Ap. pp. 260-263).

If as libelant claims the "Bayard's" market value was \$4215 a day, it was peculiarly incumbent upon libelant to mitigate the damages and get her to sea. Had the repairs been speeded up, as we submit they very easily could have been, a great saving would have been accomplished.

The figures will naturally go to a reference if this consideration becomes material. Suffice it therefore to say here, in passing, as an indication of the substantial character of the saving, that we calculate, roughly, after allowing for the additional labor cost, a net saving by the use of double shifts of \$104,722.31.

Libelant argued below that the men for a second shift were not available and relied on the testimony of Mr. Siversen. But we question the correctness of his recollection as to the situation at that time, for he testified also that double shifts could usually be provided where the case was really urgent (Siversen, Ap. p. 291), and this was a case of utmost



urgency if the "Bayard's" time was worth what libelant claims for her. *And Mr. Siversen in fact provided extra men for work on the "Bayard's" engines at the same time that the repairs covered by the specifications were being prosecuted* (Siversen, Ap. p. 295). *Therefore, he could have given extra men for those repairs.* We accordingly contend that two shifts could and should have been used.

But if they could not, overtime could. The record is clear on that. And we calculate that, after allowing for the additional labor cost, overtime would have yielded a net saving of \$69,129.77.

Our calculations of the figures of saving by use of double shifts or overtime are of course only approximate and are given here simply to indicate that the savings would have run into very real figures and should have been made if the value of the "Bayard's" time were to be set at the great price claimed for her. Neither the points nor the figures are of any interest unless there should be a reversal of the decree in toto, in which event the calculation of the amounts will naturally go from the court below to the Commissioner. In other words, we do not name these figures as in any sense established now.



No. 3906

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

3

AKTIESELSKAPET BONHEUR (a corporation),

*Appellant,*

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY  
(a corporation), claimant, of the American  
Steamer "Beaver", her tackle, apparel, en-  
gines, boilers, furniture, etc.,

*Appellee.*

REPLY BRIEF FOR APPELLANT.

NATHAN H. FRANK,

IRVING H. FRANK,

*Proctors for Appellant.*

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## REPLY BRIEF FOR APPELLANT.

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In considering respondent's brief we have to remark at the outset that, in our view, many extraneous matters are called to his aid by the respondent, which have no claim to be considered in a judicial determination of the facts.

In the first place, he tries to ring in a patriotic appeal in favor of the respondent. Much time is given to a detail of the chartering committee and of its motives, and odium is attempted to be cast upon the appellant by calling him a profiteerer, that word having become odious to many during the prosecution of the war.

Now, whether the motives of the Shipping Board were good or bad, is utterly immaterial. We will assume that the Shipping Board were actively attempting to do their duty as they saw it. It was WAR, and the seizure of *neutral* vessels in order to get the benefit of the use of them for the American Government, and at a rate below their market value, may be questioned in morals, but whether right or wrong is a question with which we have no concern. As we say, it was WAR, and we assume that all is fair in war. At any rate, we are not considering the ethics of it.

Now, the charge that the appellant was profiteering is likewise immaterial. He was not engaged in the war, nor called upon to favor either party. He was a neutral, and was in trade, and entitled to take advantage of the market, whatever that might be. Furthermore, in this case he was not proposing to profiteer against the government, or in fact against any one; he was in negotiations with Mr. Moore for a charter which was perfectly agreeable to Mr. Moore, the vessel having been in the employ of Mr. Moore for a period of six months previous. If Mr. Moore was satisfied that he was getting the vessel at its market value, the *respondent* has no cause of complaint. It is unfair to attempt to invoke the sympathy of the court for the tortfeasor by calling libellant's ship a "profiteerer", or to speak of the owner of the vessel as "defying the Government". He was simply seeking the market rate for his vessel; to which under the law he is entitled. The reasons for the Government's interference are immaterial. Viewed from a purely ethical point of view, the Government was

taking from a neutral its property solely because it had the power to do so and needed the vessel. There is no reason why the neutral should accede to this procedure unless compelled to by force.

So this question of profiteering may also be laid aside as good oratory, but not legitimate argument.

Again, wherever in his brief respondent lacks proof necessary to establish his point, he appeals to the court to take "judicial notice". That is a convenient way to fill out the lack of proof, but "judicial notice" is not taken of the facts with which he proposes to fill out his record.

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**THE QUESTION AT ISSUE, AND ONE UPON WHICH THE CASE MUST TURN, IS A QUESTION OF BURDEN OF PROOF.**

Respondent takes the position that the burden is on the libelant to prove that the vessel would *not* have been prevented by the Shipping Board from sailing under the charter, thus throwing upon the libelant the onus of proving a negative. In fact requiring the libelant to negative the respondent's defense before respondent had established any defense.

In support of this, he cites several cases, and quotes from them, but they do not bear out his contention. Among them he quotes from *The Potomac*, 15 Otto, 630, 26 L. Ed. 1195, and his citation from that case shows the error into which he has fallen. In this case he begins the quotation in the middle of a sentence, and thus an erroneous idea is conveyed as to the meaning

of the decision. For instance, he quotes as follows (Br. p. 10):

“\* \* \*; in no event can more than the net profits be recovered by way of damages, and the *burden is upon the libelant* to prove the extent of the damages actually sustained by him”.

It is not the beginning of a sentence, and is separated from what precedes it by a semicolon. By this means he seeks to place a different meaning upon it from that which it was intended to express. But it only requires that the entire sentence be read to ascertain what is meant by this last half of it. It is as follows:

“When there is no market price, evidence of the profits that she would have earned if not disabled is competent; *but from the gross freight must be deducted* so much as would in ordinary cases be disbursed on account of her expenses in earning it”;

Then follows the matter quoted by respondent:

“in no event can more than the net profits be recovered by way of damages, and the burden is upon the libelant to prove the extent of the damages actually sustained by him”.

This states the rule as we have laid it down in our brief, and which we have followed in our proof.

We are not asking for the gross freight, but we have deducted from it

“so much as would in ordinary cases be disbursed on account of her expenses in earning it”, precisely as the decision says. (See original brief, pp. 44-45.) And this is all that the court had in mind when using the above language.



So, too, the quotation from *The Conqueror*, as follows:

“That the loss of profits or of the use of a vessel pending repairs, or other detention, arising from a collision, or other maritime tort, and commonly spoken of as demurrage, is a proper element of damage, is too well settled both in England and America to be open to question. It is equally well settled, however, that demurrage will only be allowed when profits have actually been, or may be reasonably supposed to have been lost, *and the amount of such profits is proved with reasonable certainty.*” (Italics are respondent’s.)

Here, again, he has broken the language from its context. It referred to the special facts of the case, which were entirely different from the case at bar. It was a case where NO COMPETENT *proof was made of the value* of the use of the yacht.

This is pointed out by the court in *The North Star*, quoted in our brief, at page 13, where it says:

“I must concede that some of the language in that case, broken from its context, lends itself to that conclusion, but the decision involved nothing of the kind. It turned upon the dubiousness of the proof of value of the yacht. \* \* \* I see no reason to think that, if the exchange value of the yacht’s use in *The Conqueror*, supra, had been established in the customary way, the libelant would have had further difficulty in his recovery.”

In other words, the libelant did not make out the prima facie case by establishing a market value, and deducting from that market value the cost of earning it.

So, also, in the case of the *Loch Trool*. The part quoted on page 11 of respondent’s brief is based upon

the authority of *The Conqueror* and *The Potomac*. There, again, he quotes (respondent's italics):

*"The burden of proof is upon the libellant to show the amount of such damages."*

Inasmuch as the rule stated is based upon the authority of *The Potomac* we may assume that it meant to state the rule as *The Potomac* states it. It is to be noted that the court uses the word "*amount of such damages*". It does not pretend to decide that it must negative all objections proposed by the respondent to its recovery when the amount is once established in the usual way, to wit, by the market value, less the cost of earning it. If he did, then *The Potomac* and *Conqueror* are not authority for such decision.

So he cites from *The North Star*, 151 Fed. 168, on page 13 of his brief, the following:

*"In ascertaining whether earnings have been lost by the owner, the inquiry is not whether they could possibly have been made by the use of the vessel during the period for which he has been deprived of her use but is whether they would have been made. \* \* \** It suffices if he shows a state of facts from which a court or jury can find that there was an opportunity for him to do so and that he would probably have availed himself of it. *But if it appears affirmatively, or if the reasonable inference from the facts established is, that there was no opportunity, or that he would have refused the opportunity if offered, it is impossible for a court or jury to find legitimately that he has sustained actual loss."*

Now apparently he has overlooked the significance of this ~~mis~~quotation. The rule is laid down that

*"But if it appears affirmatively or if the reasonable inference from the facts established is that*

there was no opportunity, or he would have rejected the opportunity, if offered, it is impossible for a court or jury to find legitimately that he has sustained actual loss.”

But if it must appear *affirmatively*, or if the facts upon which the finding rests must be *established*, respondent must prove it. He cannot merely suggest it, or leave it in doubt, he must show these things affirmatively or establish the facts, and thus the burden is upon him to prove it, and not upon libelant to negative a thing not proven.

We say this is for them to prove in the first place. It is their defense. We have made out a prima facie case by proving her value in the market, and if there be some peculiar reason why we could not obtain the market, it is for them to show it.

These are the only cases cited by the respondent to the foregoing point. The other cases are to the point that the libelant’s proof must show the loss of the profits with *reasonable certainty*.

This is not an issue in this case. We admit the rule that it must be proved with reasonable certainty under limitations mentioned in our opening brief, and this we think we have done in our opening case. It does not mean that respondent can by the suggestion of the difficulty in obtaining the market destroy this “reasonable certainty”. He must *prove the facts* upon which his suggestion is based, and the question we are now discussing is, upon whom is the burden of proof of these facts,—on respondent to prove it affirmatively? or on libelant to prove it negatively?

There are several other cases cited and quoted from principally of inferior courts and do not apply to the principal question here discussed. They seem to be pointed to the question whether if the court holds that the Shipping Board would have prevented the obtaining of the market price, as proved by libelant, is the court justified in depriving us of the 45 shillings which it is alleged they would have approved but which they allege we would have refused to accept, based upon the fact that the "Brazil" lay idle during the same time? This is a separate matter, and if we are right upon the principal question at issue, need not be considered. We have already treated of this subject in our opening brief.

Among the cases cited, we note the *Wm. M. Hoag*, 101 Fed. 846, which is in direct conflict with the decision of this court in *The State of California*, 54 Fed. R. 404-407, where this court said:

"The fact that another vessel belonging to the same owner was used as a substitute for the disabled steamer during the time of her detention should not militate against the right to compensation, nor afford just cause for awarding less than would be allowed if the owner, from lack of enterprise or inability, failed to have an available substitute for use in such an emergency."

In the *State of California*, too, this court stated what it conceived to be the rule regarding the certainty with which proof must be made. It was said:

"The right to compensation for loss sustained by actual detention of a vessel in consequence of a collision with another vessel found to be wholly or partially in fault is settled by numerous decisions and the uniform practice of the courts of this



country, and it is our opinion that the value of the use of the injured vessel during the time of actual, necessary detention is the proper measure of the amount to be allowed. While the evidence in this case does not contain opinions or estimates of the value of the use of the steamship during the time of her detention of persons having knowledge qualifying them to testify as experts, it does show the facts as to the number of days lost while the damages caused by the collision were being repaired, and shows the average daily earnings of the vessel for a period extending from six months prior to the end of six months subsequent to the date of the collision, from which the court could as well determine the capacity of the ship and the condition of the trade in which she was then engaged, and make a fair estimate of the value of her use during the time of her detention, as from expert evidence. *The fact that another vessel belonging to the same owner was used as a substitute for the disabled steamer during the time of her detention should not militate against the right to compensation, nor afford just cause for awarding less than would be allowed if the owner, from lack of enterprise or inability, failed to have an available substitute for use in such an emergency."*

This should put at rest any question as to the degree of certainty of the proof in the case at bar.

We take the liberty of calling attention to some additional cases of great authority that seem to be determinative of the question raised by respondent. It will be noted that the cases relied upon by respondent are largely inferior court cases. The cases following are from courts of great authority, and if they conflict with respondent's cases they are for that reason preferable and more persuasive than those of respondent.

In *Randall v. Sprague*, 74 Fed. R. 247 (C. C. A.), where a vessel could not have sailed in any event because the harbor was blocked by ice, the court, in allowing demurrage, says:

“Again, it is claimed that there were no actual damages, because the vessel, if she had been loaded, could not have sailed sooner than she did, on account of a continued blockade of the harbor by ice. The court directed this last proposition to be reargued, and has given it very careful consideration. We think it is well proven that the *Randall* could not have gone to sea sooner than she did, except that possibly she might have been towed out at a disproportionately large expense. Even this is not clear, nor is it clear that the vessel could properly have thus risked her cargo. This brings us to the question of law raised on this point. \* \* \* The libelees cite no instance in which the rule claimed by them has ever been applied; yet there must have been an innumerable number of cases where, on account of adverse winds lasting for some time, existing where and while vessels were detained for loading, it would have applied, if sound. The proposition opens up an unlimited field, as there would seem to be at least equal reason for permitting proof that the port of destination was so blockaded with ice that the vessel could not have arrived if she had sailed, of that adverse winds prevailed which would have obstructed her voyage. It thus illustrates, that, inasmuch as courts cannot easily estimate all the contingencies of navigation, therefore, in maritime matters, *rusticum iudicium* is often given, and arbitrary rules often prevail.”

Consider in conjunction with this decision, the language of *The Mayflower* concerning whose authority no question is or can be made, referred to in our opening brief (p. 17) as follows:

“But the evidence given being the best the case affords, and being reasonably certain, I think strict

justice requires that the party in fault should bear whatever inconvenience or hardships there may be arising out of the attendant difficulties and doubts.”

\* \* \* \* \*

“He has no right to fix this inconvenience upon the injured party; and if that party derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification without exposing him to some loss or burden, which the law will not place upon him.”

So, also, *The Mason*, 249 Fed. 720 (our opening brief, pp. 7 & 8), and the *Margaret J. Sandford*, 37 Fed. 152.

So the English House of Lords has spoken upon the subject in no uncertain terms, and these cases are certainly as persuasive as those of inferior courts in this country which are of no more binding authority on this court and less persuasive than is the highest court in England.

In *The Great Holme*, 8 Aspinall Maritime Cases, 317 and *The Mediana*, 9 Id. 41, both decisions by the House of Lords, it was held that demurrage should be allowed for delay consequent on a collision, though no actual out of pocket pecuniary loss could be definitely proved by the owners of the injured vessel. In the former case a dredger, which was the property of a harbor board was injured and, although the work was carried on by other vessels, recovery was allowed. Lord Halsbury there said:

“That the dredger was required for their use cannot be denied; that their operations in reducing the silting up were delayed by the loss of it cannot be denied. Both these facts are found adversely to the respondents; then why are not the appel-

lants entitled to recover damages for the loss thus sustained? The answer given is that, although their dredging operations were delayed, the appellants, sustained no tangible pecuniary loss. I am not quite certain that I understand what is meant by the use of the word 'tangible'. If by that is meant that, in order to entitle a plaintiff to recover, you must be able to show that, during the period of repair to his vessel, or his cart, or his horse, some specific money has been lost by the period of time during which the article has not been susceptible of being used, the principle so affirmed would, as it appears to me, go very far beyond the particular case now before your Lordships. But to my mind it is a principle for which there is no authority whatever."

In the latter case (*The Mediana*) the same judge (who was the Lord Chancellor) says:

"In this particular case the broad proposition is that the respondents were deprived of their vessel. I purposely do not use the words the use of their vessel. *For the wrongdoer has no right to inquire what or whether any use would have been made of the vessel of which the respondents were deprived.* Suppose, for example, some one went into my house and took away a chair and retained it for some months, could anyone say that I as owner am entitled to no reparation on the ground that I have other chairs or that I was not in the habit of sitting upon that particular chair? The jury's task is often a difficult one in cases of that character, and an arbitrator or jury often has to take an artificial hypothesis; such as in the case to which I have referred what it would cost to hire such a chair. *The broad principle applicable to this appeal is quite independent of the particular use which the respondents would make of the 'Comet'.* It is wholly different from a case of special damage, where you have to ascertain the specific loss of



*profit or other advantage which would otherwise have accrued.* Where special damage is alleged you must show precisely the nature and extent of the injury sustained, and the person liable must have an opportunity of inquiring into the details before the case comes into court. In the case, however, of general damage no such principle applies, and the jury have only to give a proper equivalent for the unlawful withdrawal of the particular subject-matter.”

In *The Astrakhan*, 11 Aspinall Maritime cases 390, demurrage was allowed for deprivation of the use of a Danish war ship and the court uses the following interesting language:

“But I have to ask myself, in this peculiar case, did the Danish Government lose anything by this vessel being laid up for repairs? *It is said that she would, in any event, have been laid up; but, the unforeseen might have happened, and I think in all these cases you should look to see what is the potential use which the Danish Government had for this vessel.* Their potential use was to have her under their control to use if they wanted her; they might have wanted her for Royal purposes, to conduct Royalty about from some place to another, or to receive Royalty, or for fishing purposes, or for any unforeseen purpose which you may imagine. The Government would not have been able to make use of her if these things happened. I do not think I ought to wait, and say ‘I must be satisfied that it was required’. If you deprive the owner of the use of a thing, it is not necessary to show that he would have used it but if you put it out of the power of the owner to use it, then, according to Lord Halsbury’s reasoning in *The Mediana*, I think you have to pay damages for that.”

Again we say, considering these cases in conjunction with

*Williamson v. Barrett;*  
*The Margaret J. Sandford;*  
*The Mayflower;*  
*The Mason* and  
*The State of California,*

determined by this court, it should not be difficult to determine the rule to be applied in this case. Certain it is, from any view that may be taken of it, that the burden of this defensive matter, namely, that the Shipping Board would interfere to prevent us from securing the market rate, is upon the respondent.

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## II.

**IF WE BE RIGHT IN THE RULE OF LAW APPLICABLE, IT ONLY REMAINS TO CONSIDER THE TESTIMONY OF MR. SMULL TO DETERMINE WHETHER OR NO THE RESPONDENT HAS PROVED IT.**

We think we have sufficiently indicated in our opening brief what the final conclusion as to the effect of Mr. Smull's testimony should be.

He expressly admits that he could not say whether the Committee *would*, or *would not*, approve the charter.

“I don't think it would, but I want to qualify that by the statement that we have never said as a committee what we would do until the charter was put before us.” (Rec. p. 193.)

And he gives the reason why. In other words, no single member of the committee could tell what they would do, or would not do. He might give his opinion, but each

member of the committee was required to pass an individual opinion upon each charter, and the majority, of course, rules. Mr. Smull was not the majority.

It will be noticed, too, that the matters referred to by respondent were generally answers to leading questions by his counsel, and consisted in "Yes", or "No". When, however, he was called upon to give a more detailed answer, facts not so favorable appeared.

It also appeared conclusively, that there were no *dis*-approvals, and thus the fact that there were no approvals proves nothing, save that there were no applications.

However, when there *was* an application, they approved "The Transvaal" charter (Rec. pp. 252, 327), a charter of exactly the same character as the Moore charter, for a larger amount, at a date when the board was in better working order and had definitely worked out its plans. At November 3d they had not yet settled upon a fixed course of procedure, and the question had not come up.

Objection is made to the consideration of this "Transvaal" charter, but the fact that they approved it at this late date, particularly when Mr. Smull testifies that four days preceding its approval the board had finally decided that no neutrals could be chartered to merchants, shows that in November preceding there was no fixed rule excluding such charters.

Respondent makes a peculiar argument for the exclusion of the consideration of this "Transvaal" charter party. He says it is beyond the period of the deten-

tion of the vessel, and at a time when, even if material there could be no cross-examination of the chartering committee on it. On that period, and that period alone, was Mr. Smull examined, and he attempts to show that libelant never requested a production of the Board's records for any period beyond January 1, 1918; that we presented the "Transvaal" charter after the deposition of Mr. Smull had been taken. (Br. p. 57.)

This is a peculiar objection, and one that does not commend itself to any reasonable administration of justice. The fact is not disputed, but he says we never asked for it when Mr. Smull was present. The reason we never asked for it is patent; they would not let us inspect the records for ourselves. and we knew nothing of it until after the examination had closed. However, if respondents thought it important that they should have the advantage of re-examining Mr. Smull, in order to ascertain if the offer of the "Transvaal" *spoke the truth* there was no reason why they could not have made application to that end. But what would they examine Mr. Smull on? Mr. Griffiths admitted that it was executed and approved by the Shipping Board and the vessel sailed under the charter:

"I do not question the charter-party and that that is a true copy. My stipulation does not go to any consent of its materiality. I claim that it is away beyond the period examined into in this case and in the depositions taken in New York." (Rec. p. 253.)

Therefore, we have the fact that it is a true copy of the charter-party, and that it was approved by the committee, and the simple objection is as to its ma-



teriality because beyond the time examined into of Mr. Smull. Well, that is no objection to its materiality,—it is a fact, and it is material to prove that there was no fixed rule under which the Board acted by which it could be determined that they would have *disapproved* the Moore charter. And it further gives some foundation to the claim that the Board was reluctant to allow a full examination of their records because

“The board is soon to be confronted with voluminous litigation in collision cases and it is to its interest to have the demurrage rates kept down.” (Rec. p. 242.)

It may be that other such transactions might be discovered in the records between January 1st and March 18th.

The objection seems to be a withdrawal of the statement made by Mr. Griffiths at the hearing that “All I want is to get at the *truth* about this demurrage.” (Rec. p. 124.)

It seems that this charter-party not only fails to support their contention that the chartering committee would have *disapproved* this charter, but as near as can be without action by the Board on the Moore charter itself, proves the contrary,—that they would have approved it. The statement in the brief (p. 57) that

“The District Court in effect sustained the objection and rightly, we think, gave no consideration to the ‘Transvaal’ charter party”,

seems, in our view, to be a concession that if the court *had* given consideration to the “Transvaal” charter-party, its judgment would have been different. But if

it gave no consideration to that charter-party, it was grievous error.

There being no disapprovals during the time the "Bayard" was detained, and the very first time an application (so far as appears by the record) was made for such a charter, it is *approved*, seems to be very material, inasmuch as it almost compels the inference that had this been presented it also would have been approved.

In considering Mr. Smull's testimony it must also be borne in mind that he was in error in his assumption that they only approved such charters in cases where the vessels were in a foreign trade in order that they might be brought within the reach of the Shipping Board in an American port.

With this we think we can safely leave the subject with the review we have given to Mr. Smull's testimony in our Opening Brief.

They have not only failed to prove that the Shipping Board would not have approved the Moore charter, but we think that the "Transvaal" charter reasonably leads to the conclusion that they would have approved it. At any rate, they are far from establishing the defense that they propose.

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### III.

#### THE FINDING OF THE DISTRICT COURT ON CERTAIN DISPUTED ITEMS OF DAMAGE NOT INCLUDED IN THE STIPULATED PHYSICAL DAMAGE (Respdt's. Br. p. 93).

These items were for the wages of the watchman during the period of detention and the coal used for

cooking during that time, as well as the wages and victualling of the crew.

It is said by respondent that it was proper to disallow these amounts, as the court found that we were not entitled to demurrage, and that the vessel would have been idle during the repair, regardless of the collision,—that these expenses were not imposed upon libellant; they would have been incurred anyway. (Brief p. 94.)

The answer to this lies in the authority of *The Conqueror*, where the court did not allow demurrage, but did allow precisely the same items which we claim above.

*The Conqueror*, 166 U. S. 110; 41 L. Ed. 937.

“The other items of damage, going to make up the aggregate amount awarded, included about \$4500 for the wages and provisions of the crew and also for wharfage, towage, night watchman, and extra expenses in heating the vessel,—all of which are claimed to be unauthorized, in view of the fact that by U. S. Rev. Stat. Sec. 829, the marshal is allowed, ‘for the necessary expenses of keeping boats, vessels or other property attached or libeled in admiralty, not exceeding \$2.50 a day.’ While it is entirely true that the marshal is thus limited, it does not follow that the libellant may not incur a larger expense if, in his opinion, it is necessary for the proper protection of the vessel, subject to the contingency of paying for it himself, if he be unsuccessful.”

The court then reviews the facts, and says that it does not find anything in the testimony or in the circumstances of the case to warrant the conclusion that the expenses of keeping such a vessel while in the collector’s or marshal’s possession, were extravagant, and inasmuch

as the Commissioner found that they were proper, and the District Court and Court of Appeal affirmed his action in that regard, they were not disposed to disturb their finding although the amount seems large.

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#### IV.

**THE RESPONDENT SAYS THAT LIBELANT MAKES NO CLAIM FOR DEMURRAGE BASED UPON THE RIGHT TO BERTH ON OWNER'S ACCOUNT (Respdt's. Br. p. 71).**

But in this claimant is mistaken. The Moore charter is simply used to prove the market value of the ship at that time. The berthing of the vessel is for the same purpose proven that the court can see what the market value of the vessel was. Both are to be taken into consideration by the court and that one adopted which in the view of the court is better suited to the purpose. In our brief (p. 16) we expressly said:

“However, we deem it immaterial, insofar as fixing her market value is concerned, that the charter was not entered into. Being an offer in good faith in a competitive market, for the use of the vessel by a party in whose employ she had been for a period of about six months just preceding the collision, the offer fixes definitely, and with more than ‘reasonable certainty’, the market value of the use of the vessel at the time of the collision, and in the consideration of this question *the time of the collision, November 3rd, is the time when respondent's liability became fixed.*” etc.

Again, on page 44:

“We think therefore we have disposed of the suggestions of the defense by which they hoped to de-



prive us of the market value of the use of the vessel during the period of repair, and we have only to figure the amount.

“We will place before the court the figures showing the *different method* under which that amount can be arrived at.”

“There can be no doubt of the *market* value of this at that time.”

“The offer of \$400,000 fixes the market value.”

Again (p. 47),

“There can be no question fairly made as to our claim of the market value of the use of that vessel during the period of detention, and under the law it is the market value that determines our recovery.”

In view of the foregoing, we do not see how respondent could possibly have come to the conclusion that we make no claim for demurrage based upon the right to berth on owner's account.

We claim demurrage based upon the market value of the vessel, and the right to berth on owner's account is one of the means of proving that market value.

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### **Answer to Propositions in Respondent's Appendix.**

We will first take up the question discussed in Proposition D (Appendix p. XX), namely,

“the libelant neither used overtime nor double shifts in repairing the ‘Bayard’.”

Respondent strenuously urges that overtime should have been worked in the repair of the vessel, and that

it should have credit for the difference between the extra cost of such overtime, and the daily demurrage for the days, if any, that might thus have been saved.

This proposition rests, as we shall presently see, upon the familiar game of chance, "Heads I win, tails you lose"; for, if it turns out to respondent's advantage, he will adopt it, while if to his disadvantage, he will reject it, and we would have no recourse.

But as we have already suggested, the claimants are foreclosed with respect to this question by *their agreement*, to say nothing of the practice in such cases, to which we shall presently refer.

The agreement was that the vessel should be

"repaired by the Union Iron Works Company *on the basis of time and materials at going rates*, the owners and *underwriters* of the 'Beaver', if that vessel is ultimately held liable for the collision, will not question the propriety of that method of repair.

\* \* \* To further eliminate so far as possible controversy over the character of repairs to be made, we suggest that it would be well to permit the *surveyors for the owners and underwriters* of the 'Beaver' to join with its surveyors for the owners and underwriters of the 'Bayard' in preparing specifications for the repairs." (Rec. p. 17.)

In view of a discussion with counsel of the relation of the Underwriters to this question which took place during the taking of depositions (Rec. pp. 268, 279, 280), we take this occasion to call special attention to the fact that, under its terms, this agreement was an agreement on behalf of both the owners and *underwriters*, and that the surveyors therein are specially mentioned as surveyors for both the owners and underwriters.

Under these circumstances, the surveyors were the agents for the respondent for the purpose of seeing that those repairs were properly and economically made. Not having offered any objections to the mode of repair at the time when they should have made such objections, they are now estopped from raising the same, because it is a change of position, at our cost and expense.

Moreover, straight time is the usual and ordinary method of making repairs. Overtime is very much more expensive. It is more expensive from two points of view: First, the double pay to the workmen, and, second, by reason of the decrease in the efficiency of the workmen, in that they do not accomplish as much in a given time as they do upon straight time. This is a well settled economic principle.

Under these conditions, had we worked overtime, there is not the possibility of a doubt but what the respondent would have contested our right to recovery for the repairs, basing their contest upon the increased cost of overtime. The proof of this lies in the testimony to which we shall presently refer.

Moreover, the *agreement* is for repairs on the basis of time and material, *at going rates*. The ordinary method of repair is straight time, and the going rates, straight rates. The underwriters recognize and pay for nothing else.

So, also, the language of the agreement is the *language of the respondent himself*. Had he meant to vary the ordinary method of repair by requiring us to work overtime, he should have said so. The agreement was entered into for the purpose of eliminating con-

troversy over the expense of the repairs. The purpose of the agreement, as stated by Mr. Griffiths, is as follows:

“There is an agreement between the parties that the repairs should be made by the Union Iron Works, and that the repairs, if so made, *should be without question at the cost or time, if made at the going costs and going time by the Union Iron Works.*” (Rec. p. 15.)

Yet in support of his objection he contends that

“if this vessel was, as the libelant claims, free to sail and had up to her a charter, which was worth something like \$4000 a day, then overtime should have been used upon the repairs to the vessel.” (Rec. p. 15.)

To this we reply that, if so, namely, if the fact that the rate of demurrage was high, should have spurred us to the use of overtime, then it should have spurred the respondent to suggest the use of such time, and agree to it, not leave the responsibility of taking chances of their agreeing to it, upon us. They knew as well as we knew, that the rate of demurrage would be high. It was not necessary for them to know of this particular charter. The going rate on berth was \$70 a ton, while her measurement cargo capacity was 7500 tons, or \$525,000.

So, also, departing from the specific figures, respondent must have known, as everyone else knew, what was testified to by Mr. Page, namely, that charter rates were high, and going higher. As said in December, 1916, by the Circuit Court of Appeals, 4th Circuit, in *The Orion*, 239 Fed. 303:



“All the world, even a judge, knows that freight rates have been steadily rising ever since the fall of 1914, and that every ship which could safely float, has been in constant demand.”

It cannot be assumed that the respondent, itself a ship owner, or its agents, the surveyors, did not know the great value of the time of the vessel, and if so, they should have raised this question at that time. Indeed, they were advised of this by the libel, which alleges the damages would exceed \$200,000, and which was filed November 12th, in the early stage of the repairs. They had themselves figured the cost of repairs at \$70,000, leaving the balance for the demurrage claim and incidental expenses.

Under those circumstances, how can they have the hardihood to attempt to charge us with responsibility for not doing something which their language does not import, and which their surveyors did not require. Every consideration of justice and fair dealing is against them, as well as is the law.

But let us examine the evidence of their own surveyors, called for the purpose of charging us with this overtime.

First, let us refer to *Capt. Bryn*, Rec. p. 39:

I am familiar with the agreement read to the Court, and acted under it. At that time Mr. Blackett and Mr. Evans<sup>ey</sup> represented respondent in this case. They were present during the entire time of the repairs, were there all the time.

“Q. Now, what, if anything, did you do with regard to consulting them as the repairs went along, as to the manner in which they should be made, the nature of the repairs, etc.?”

A. I kept them fairly acquainted with the repairs as they were going on, and both of these men were down at the Union Iron Works, where they had their work at the same time in other ships as well, and they came down and looked at my ship once in a while.

Q. During that time, was any suggestion made by either of them that the repairs were not proceeding in the manner in which they desired or which was most beneficial to the parties?

A. No, there were no remarks made.

Q. So far as you were concerned, how were they proceeding with it—with diligence or otherwise?

A. Yes, we were going on as energetically as possible, and always working in *conjunction with the 'Beaver' people; they always had the say in the matter; we allowed them to go over there and check up everything, all of the amounts and everything.*

Q. In other words, you were proceeding upon the assumption that they were going to pay the bills and they should have the say as to how the repairs should be made?

A. Yes."

Now, Mr. Blackett, representing the respondents, takes the position that he was only appointed to indicate what repairs should be made in accordance with the specifications, and that beyond this, he had no authority to direct them as to the manner in which the work should be done.

Nevertheless, he admits that overtime on a repair job is a matter of *special arrangement*;

"Usually all parties connected with the case, and representing the various interests are consulted in the matter." (Rec. p. 267.)

That

"*Underwriters only pay straight time.*" (Rec. p. 267.)

In this connection, a discussion arose between counsel as to the materiality of the fact that the defense in this case is made by the Underwriters. (Rec. pp. 268-69.) There is no denial but what the Underwriters are defending in the name of the San Francisco & Portland Steamship Company, but it is insisted that that fact is immaterial.

However, the agreement between the parties regarding the repairs makes the Underwriters a party to said agreement. In the first paragraph of that agreement, we find the following:

“the owners and *Underwriters* of the ‘Beaver’, if that vessel is ultimately held liable for the collision, will not question the propriety of that method of repair,”

and in the second paragraph,

“we suggest that it would be well to permit the *surveyors for the owners and the Underwriters* of the ‘Beaver’ to join with the surveyors for the owners and Underwriters of the ‘Bayard’ in preparing specifications for repairs”. (R. pp. 323-324.)

It, therefore, seems conclusive, that though Mr. Blackett tries to avoid the position of being a representative of the Underwriters, he nevertheless, by the very terms of the agreement, has become their representative, and as he admits that the Underwriters only pay straight time, and that overtime is a matter of special arrangement, where all the parties connected with the case and representing the various interests are consulted, and, as he further testifies (Rec. 267):

“For instance, if I were representing the Underwriters direct in the case, not watching a case on

behalf of them, but actually handling a case for them, I would *suggest* overtime."

It would seem that, in default of such suggestion by this representative of the Underwriters, there is no recourse for the owners, except to employ straight time; that if the Underwriters desired a departure from the understood condition, viz.: that "the Underwriters only pay straight time", it was their place to suggest the change from that condition.

So, too, Mr. Evers the other surveyor for the respondents ["Owners and Underwriters"], is asked (Rec. p. 278):

"Q. Was any effort made so far as you could discern, on the part of the owners, or the representatives of the owners of the 'Bayard', to speed up the repairs?

A. Well, they never asked to work overtime, if that is what you allude to, they never asked it.

#### CROSS-EXAMINATION.

Mr. FRANK. Q. And you never suggested it?

A. No, sir; I never suggested it; I am not supposed to suggest it.

Q. In the case of the 'Beaver' you say you had consultations as to whether or not overtime should be used?

A. I wish to correct myself a little there. I consulted with the owners of the vessels, and they said they wanted to work overtime, on it. Then I asked the Underwriters' surveyor and *he made me show him how I could save the time*, and I showed him how by working overtime we could save the time, and then we went along with it so as to get the vessel out.

\* \* \* \* \*

Q. That is, if the owners had insisted upon it, you would have done it, and the owners would have had to take their chances for the overtime?



A. Yes, and that would have been settled by the Average Adjusters at the finishing up of the business; it would be my argument against his.

Q. In other words, they would take the chance of the Underwriters accepting it, if it turned out to their advantage, but if it turned out to their disadvantage, they would not accept it; is that right?

A. *Yes; the Underwriters would have objected to paying it.*

Q. Because straight time is understood to be worked?

A. It is what the Underwriters guarantee to pay.

\* \* \* \* \*

Q. That simply amounts to the fact that there is a special arrangement between the parties, if the parties agree that they shall go on and do the work on time and material basis, it is understood that it is straight time." (Rec. p. 279.)

After another discussion between counsel respecting the Underwriter's participation in the defense, the witness answers (Rec. top of page 281):

"A. Unless the owners want to work overtime.

Q. If they have such an agreement—unless they have a special agreement to work overtime it would be straight time, would it not?

A. Yes, unless the owners insist upon *working on their own and paying for the extra themselves.*

Q. And paying the extra themselves?

A. *Sure."*

\* \* \* \* \*

"MR. FRANK. Q. If any two parties agree that it shall be done on time and material basis at going rates, it is understood by that agreement that it is straight time; if one man agrees to pay for certain repairs to be done on time and material basis at going rates, it is understood, unless there is some special arrangement, that that is straight time?

A. That is true." (Rec. p. 281.)

Again (Rec. p. 282):

“Q. And if I make an agreement with you that I am going to make the repairs—and I am not the Yard—you and I have a controversy as to which one will pay for it and I make an agreement with you, in which you agree to pay for the repairs, if I have it done on time and material basis at going rates, you understand that that is straight time, do you not?

A. I understand that that is straight time.”

This would appear to settle the question of the obligation of the libelants to work overtime.

However, another fact appears, which is even more conclusive:

Mr. Siversen, the representative of the Union Iron Works, supervising and directing the Iron Works in the work of repair, testifies, on cross-examination by Mr. Griffiths:

“Q. Did the owners, or the owners’ representatives, ever suggest to you during the repairs on the ‘Bayard’ that there was any hurry to get the ‘Bayard’ out?

A. They wanted to get the ‘Bayard’ out as quick as they could.

Q. Did they say that?

A. I think they made the request that they wanted to get the ‘Bayard’ to sea not later than the 6th of December, as far as I remember, *but we were not able to do it.*” (Rec. p. 291.)

Again (Rec. p. 288):

“Q. What, if anything, can you say concerning the conditions at the Yard with respect to men available for this work, for an extra shift at night time?

A. I know that we were very busy at the time, and we had not sufficient men for a double shift, in the first place; in the second place, it is very difficult to get the men to work a double shift on a straight eight-hour basis; in cases where you can get the men to work a double shift, they insist upon working 11 hours.

Q. At any rate, you did not have the men available, I understand, for a double shift?

A. No."

#### RE-DIRECT EXAMINATION (Rec. p. 292).

"Mr. FRANK. Q. They were proceeding along with all the diligence they could, were they not?

A. Yes.

Q. Except that they did not use overtime?

A. They did not use overtime.

Q. You say you can usually arrange to give men for overtime, but in this particular case you said you could not do it?

A. We were not asked to do it.

Q. You said you could not put on two shifts?

A. We could not put on two shifts if they had wanted it.

Q. And as I understand it, they told you they were anxious to get the ship not later than December 6th, and you were unable to get it to them even by that time?

A. I should probably not be so positive regarding the date, but I know that it was more than a week sooner than the vessel was delivered; we tried all we could to do it, but we were not able to make it.

Q. In other words, they were anxious to get the vessel as soon as they could?

A. Yes, sir."

#### RECROSS-EXAMINATION.

"Mr. GRIFFITHS. Q. Who told you they were anxious to get her out in a hurry, who actually told you that?

A. Captain Bryn."

So we see, that with regard to the overtime, an agreement was made, which agreement fixes the manner of doing the work, both as to time and material. That agreement was with both the owners and the underwriters; that they had representatives or surveyors there superintending the work; that the owners of the "Bayard" were working as expeditiously as they could; that they were anxious to get the vessel out, but the Iron Works were unable to give them the extra shifts to expedite the work, and that no suggestion was made by the respondents or the insurers that the course pursued was not satisfactory; that the "owners of the 'Beaver' always had the say in the matter." That they were "allowed to go over there and check up everything, all of the amounts and everything", and made no suggestion that the work was not being done as expeditiously as possible or was not being done in accordance with their agreement. Moreover, that it is the custom that unless overtime be mentioned, straight time is understood, and that the underwriters paid for nothing but straight time, and this agreement was with the owners and *underwriters*.

*They are bound by their agreement as well as by usage.*

In view of the foregoing facts, it shows a disposition on the part of the respondents to be unfair in the position they take upon this subject.

And while we are upon this subject,—the inference from the brief is that the respondents claim some credit for having admitted liability. We wish in this connection to call attention to the fact that they did not assume the liability until the deposition of their master,



Captain Rankin, proved that upon the facts they had no ground to stand upon. (See Cross-Ex. pp. 144 to 157.) When they filed their answer they denied their liability; that was on December 13, 1917. (Rec. pp. 10 to 13.) Captain Rankin's deposition was taken May 10, 1918 (Rec. p. 157), and the trial began June 17, 1918.

### **Suggestions to refer to Commissioner.**

The respondent makes several suggestions looking to a reference to the Commissioner to fix the amount of demurrage.

Before the court lends a willing ear to these suggestions, it should take the following facts into consideration:

This case has been pending for five years, having been begun November 12, 1917.

It was tried in open court June 17, 1918.

The result of a reference to the Commissioner, and the appeal that most certainly might follow, might take another five years to determine the issue.

The respondent has had full opportunity to try those issues, and deliberately refrained from doing so. On the contrary, after a full submission of all the testimony affecting the question of demurrage, desired by either party the cause was submitted.

Upon the submission of the cause (Rec. p. 252), the question of taking testimony relating *to overtime and the work on the engines* was reserved to be taken the following day in depositions (Rec. p. 255). Accordingly, on the following day the respondent called its witnesses

and took the proposed depositions of Joseph Blackett and Frank H. Evers, followed by the testimony on behalf of the libelant of L. K. Silversen *and the testimony on that subject was taken* (Rec. pp. 258-303).

It was also on the submission agreed that if the parties could not agree upon the physical damage, that would be referred to the Commissioner (Rec. pp. 255-56). Agreement was entered into respecting the physical damage, the case finally submitted, and arrangements made regarding the filing of briefs.

Respondent not only had the opportunity to take this matter up, but he *did in fact take all the testimony he desired to take on the subject, and submitted his cause with the question fully presented, or at least as fully as he desired.*

Moreover, if he had wished to take further testimony upon the subject, he had the opportunity upon application to this court at the time of the appeal to take testimony, when the libelant would have been heard upon the question, and the court would pass upon it. He allowed this opportunity also to go by, *evidently satisfied with his case as it was.*

Now he has the boldness to suggest to this court that if it referred the matter to the Commissioner to take further testimony, he would be able to prove

“a net saving by the use of double shifts of \$104,722.31”,

and that he calculates that

“after allowing for additional labor cost, overtime would have yielded a net saving of \$69,129.77”, (Appellee’s br. pp. xxii, xxiii), a total saving of \$173,000.00.

If there would have been any such saving he would not have refrained from making the proof *at the time of taking the depositions* for that purpose. The figures are ridiculous on their face and apparently are suggested with the purpose of moving the court to make the reference. He says they

“are of course only approximate and are given here simply to indicate that the savings would have run into very real figures”

(Br. p. xxiii) and he assumes that if demurrage be allowed,

“the amounts will naturally go from the court below to the Commissioner”.

Under this state of facts, it would be eminently unfair to permit the respondent to re-try the case, especially since the libellant's witnesses are beyond its reach. The vessel is a foreign vessel, and unquestionably the crew are now scattered. As a matter of law the suggestion is untenable, and as a matter of equity, if there be any in favor of their suggestion, it is more than overborne by the equities against it. A party with a full opportunity of raising the question suggested, is not permitted to sleep upon his rights, and years afterwards to recall them when his opponent is at a disadvantage with regard to the defense which he might otherwise have had.

The same suggestion applies to the proposed deduction of one-third on account of owner's repairs. (Br. p. xix.)

## C.

**PROPOSED DEDUCTION OF ONE-THIRD FOR OWNER'S REPAIRS.**

The argument on this point opens with the statement that the District Court *found the fact* that the repairs made by the owner were not made necessary by the collision.

This is a statement founded on what we deem a misconstruction of the language of the decision. The court said that,

“The fact that other repairs, not necessitated by the collision, were made, but which did not delay the completion of the repairs so necessitated is, as I view the case, immaterial.” (Rec. p. 303.)

In other words, he stated the contentions of the parties on the subject,—the respondent that repairs were made not necessitated by the collision, and the contention of the libellant that they “did not delay the completion of the repairs so necessitated”, and laid it aside as immaterial.

The respondent says that the lower court held it immaterial

“in the view that the court took of the case, namely, that no demurrage was due”.

He is placing his own construction upon the language of the court. The court gave no reason for stating it immaterial. It is quite as open to the construction that, regardless of the question of demurrage it was immaterial, because even with the demurrage question under consideration, it did not affect the legal rights of the parties.



The statement of facts following this statement (Br. p. xiii) is equally open to criticism.

It is true the "Bayard" made the repairs mentioned, but when we examine the testimony to see under what conditions and for what purpose they were made, we see that the statement made by respondent is qualified by the testimony in important particulars.

*The repairs are repairs that would not have been made but for the collision, and were made because the owners apprehended that, as a result of the shock, there might be damage to the engines not apparent upon the surface, which they would have found when at sea and which would have rendered her unseaworthy. They therefore took them apart for examination, and while they were not allowed to include them among the material damage found by the surveyors, they deemed it necessary for their own protection not to rely upon the opinion of the surveyors, but to determine the question for themselves.*

"Q. Was there anything necessary to be done to ascertain whether or not the collision had effected the engines?

A. In our opinion there was, because the shock was so strong that one of the men who was aft was thrown out of his bunk at the time of the collision, and both the chief engineer and myself insisted upon having the engines thoroughly overhauled and opened up; so we had to go to that expense and do it.

Q. What was the nature of the injury that you apprehended from that shock?

A. Some cracks or something thrown out of place."

(Bryn, Rec. p. 41.)

Mr. Blackett, the Underwriter's Surveyor, did not consider this necessary, though the claim was at the time submitted to him in the form which Captain Bryn has stated. (Rec. p 266.)

Mr. Evers, another Underwriter's Surveyor, while not answering the question categorically, namely, whether that overhauling was required by reason of the collision, simply says:

“We recommended nothing because of the collision on the engines,”

and simply testifies that when they did overhaul them, they were

“Very dirty, indeed, needed overhauling for dirt.”

That is all that he says upon the subject.

The most of the matter referred to by the respondent as to the work upon the engines is found in the testimony of Mr. Silversen, and his language throws a somewhat different light upon the subject from the language used by respondent.

He is asked:

“Q. What was the other work? Tell us what was done with respect to overhauling the engines?

A. They opened up all the cylinders *for examination* and they fitted on new piston rings; I think they refitted the cross-head brasses, *just took them down and looked them all over*; the crank pin brasses, as well, *were also taken down and examined*; the auxiliary engines had new foundations installed under them.

Q. Anything else?

A. There were a number of minor jobs; those were the principal things.

Q. Were the engines cleaned up thoroughly?

A. *Naturally, in a case like that, where there is so much work done, there is a great deal of dirt generated, and that naturally had to be cleaned up.*

Q. They naturally took advantage of the chance to clean the engines out and put them in good order; is that a fair statement?

A. What do you mean, the interior portion, or the exterior portion, of the engine-room, or what?

Q. Both.

A. The exterior of the engine-room, down around the engines was cleaned up.

Q. How about the engine-room?

A. *Naturally, when you remove a piston for examination there is always more or less dirt that has to be cleaned up.*" (Rec. pp. 293-94.)

\* \* \* \* \*

"Q. Did they do anything with reference to examining the shafts for their alignment?

A. My recollection at the present time is that the survey, or the recommendation of the surveyor called for an exterior examination of the engine and its foundations, as well as the alignment of the shaft, and that was done.

Q. And that was done because of the likelihood of injury due to the shock from the collision, wasn't it?

A. I think that is the reason that they put forth for it, yes.

Mr. GRIFFITHS. Q. Whom do you mean by 'They'?

A. The surveyors. The surveyors collectively wrote up a specification or work list that we were to carry out, and we carried out the work that was enumerated on that work list." (Rec. pp. 296-97.)

\* \* \* \* \*

"Q. \* \* \* After a collision of that kind and you know from the damage what the nature of the collision was, would you consider it a prudent thing on the part of a shipowner to take his ship out without satisfying himself that the engines and connections have not been injured by the shock?

A. No, I think the owner is justified in making all possible examination to see that nothing has happened, because once he goes to sea things might give out that they do not anticipate, and he might have considerable trouble." (Rec. p. 298.)

So we see the material facts are, that these were made for the purpose of examining the engines for possible injury that may have occurred to them by reason of the collision. It was a matter of prudence that they should be examined.

Even though the surveyors would not recommend them to be charged against the Underwriters, the owners could not take the risk of letting the engines go without being satisfied that they had not been injured by the collision.

Much is attempted to be made of the fact that they were cleaned, but while no doubt in the course of the examination some cleaning was done, it is plain that most of it was the accumulated dirt and grease that would remain there largely the result of the work. It nowhere appears that the work was work contemplated by the owners before the collision took place, or rendered necessary before the collision took place, or that the owners would have detained the vessel for that purpose had it not been in collision. It affirmatively, however, appears that the owners feared the effects of the collision on the engine, and took the engine apart as a precautionary measure against undisclosed trouble.

Under such circumstances, the rule which respondent invokes would hardly apply, namely,

"While two sorts of repairs are going on simultaneously for the account of two different persons,



justice requires a division of the common expenses." (Br. xiv.)

Neither is it the law, either American or English, that the vessel's time should be apportioned under such facts as these.

The main authority cited and quoted by the respondent to support its contention that a reduction of the demurrage charges should be made, for the reason that the ship was undergoing the owner's repairs at the same time the other repairs were under way, is

*The Sequoia*, 132 Fed. 625 (Dist. Ct. Northern Dist. of California, De Haven, J.).

With respect thereto, we desire to draw the court's attention to the whole decision, and in particular to the important fact that in that case repairs on the steamship "Cleveland" were *commenced before the collision occurred and would have proceeded to completion had the collision never taken place.*

A further quotation from the case, beyond that supplied in respondent's brief, is necessary to a correct understanding of the decision, as follows:

*"It further appears that at the time of the collision certain necessary repairs to the boilers and machinery of the 'Cleveland' were being made. These repairs were to have been completed on May 31st, but were not because it was apparent that the steamer would necessarily be detained beyond that date on account of the damage caused by the collision. While this damage was being repaired, the necessary repairs which but for the collision would have been completed on May 31st were proceeded with, and in addition to these, the owners of the 'Cleveland' had other repairs made during*

the same time, which, while they may not have been then absolutely necessary to render her seaworthy, were yet of a substantial character and of benefit to the steamer. The making of these latter repairs consumed about one week, but did not interfere with or delay the repairs made necessary by reason of the collision.

\* \* \* \* \*

The owner is entitled to demurrage for the time the vessel is necessarily detained while undergoing such repairs; that is, he is entitled to the value of the use of his ship during that period. But manifestly this rule would not be just under the *peculiar circumstances* of this case, because a portion, if not all, of the time she was delayed on account of the collision, the 'Cleveland' was undergoing other repairs which were beneficial to her.

It may be that these repairs would not have been made at that time except for the fact that the steamer was under detention because of the injury received by her in the collision with the 'Sequoia', but nevertheless the repairs made were substantial *and must have been made some time in the near future.*"

*The John F. Gaynor*, 124 Fed. 743, 130 Fed. 856, is not in point, as is shown by appellee's brief, for the reason that the survey was primarily caused by damage both from collision and stress of weather, and there was therefore only an apportionment of the damages to the causes, and it does not refer to the principle contended for by the respondent.

In the case of *The Bratsberg*, 127 Fed. 1005, it appears that the cost of the survey and docking charges were divided between the parties for the reason as stated by the court that

"Other repairs not made necessary by the stranding were made at the same time, and the English

rule which divides the damages under such circumstances seems to be fair and equitable”

citing *Marine Insurance Co. v. China S. S. Co.*, 6 Asp. 68, and *Ruabon S. S. Co. v. London Assurance Co.*, (1897) 2 Q. B. 456, 1900 App. Cas. 6, which latter case discusses the questions involved and lays down the English rule as follows:

Halsbury, L. C. (page 9):

“The agreed facts may be very shortly stated. The Steamship ‘Ruabon’ having been placed in dock for the purpose of repairs for which the underwriters were liable, while she was in dock the owner took advantage of the opportunity to have the vessel surveyed. It is part of the agreed facts *that the holding of the survey added not a farthing to the cost or a moment to the period of time during which the execution of the repairs proceeded*; and the question raised is, whether the owner of the vessel is responsible on any reason known to the law to bear part of the expense involved in the docking of the vessel and keeping her there while the repairs were being executed.”

\* \* \* \* \*

(page 11):

“It cannot be denied that the underwriters here were themselves bound to incur all the liability that they did incur, and that the shipowner was under no such liability. There is here no joint ownership which makes a liability upon all partaking of that ownership, and which liability, each is under an obligation to some third person to fulfil.”

\* \* \* \* \*

(page 12):

“But this is the first time in which it has been sought to advance that principle where there is nothing in common between the two persons, except

that one person has taken advantage of something that another person has done, there being no contract between them, there being no obligation by which each of them is bound, and the duty to contribute is alleged to arise only on some general principle of justice, that a man ought not to get an advantage unless he pays for it. So that if a man were to cut down a wood which obscured his neighbor's prospect and gave him a better view, he ought upon this principle to be compelled to contribute to cutting down the wood. Or if a man built a wall so as to shield his neighbor's house from undue wet or danger from violent tempests, he ought to be entitled to contribution because his neighbor has got an advantage from what he did."

\* \* \* \* \*

(page 13):

"But it remains to consider whether the case is not covered by authority. That supposed authority is to be found in what has been called *The Vancouver Case—The Marine Insurance Co. v. China Transpacific Co.* (11 App. Cas. 573). My Lords, I cannot think that that case *establishes any such proposition as is insisted on here. In that case the sole question was whether a particular average loss sustained by the respondent exceeded 3 per cent. within the meaning of the warranty.*"

\* \* \* \* \*

(page 15, referring to *Marine Ins. Co. v. China T. Co.*):

"LORD MACNAGHTEN. \* \* \* It was not decided that the shipowner was liable for one-half the cost of the use of the dock including docking charges, but that the underwriter in respect of his obligation was liable at least for *one-half* of the cost. *That was enough in the particular case to give the victory to the shipowner, and in this House as respondent he could not have asked for more.*"



By the decision it was held that the shipowner was not bound to contribute to the expense of the dry-docking.

The respondent quotes from the case of

*The Acanthus*, 85 L. T. (N. S.) 696; 9 Asp. 276, but a further quotation is necessary to obtain a correct understanding of the case:

“It comes to this, that a person is not bound to contribute unless there is some legal obligation on him to do so. The mere fact that he gets an advantage from the opportunity which he has taken, although it may give rise in some person’s mind to a general idea of general justice or good sense, or *one of those vague propositions which are sometimes invoked*—although it may be said on those grounds that a man who gets a benefit ought to pay for it, the Lord Chancellor points out that that is not sufficient to impose a legal obligation. The Lord Chancellor in putting it in these words appears to me to lay down the principle in the broadest possible way.” (*Ruabon Steamship Company v. London Assurance*, 9 Asp. Mar. Law Cas. 5, 1900 A. C. 12.)

As is shown in the citation from the case given in respondent’s brief, the apportionment is only made where the necessity of the owners repairs *existed prior to the collision*.

The respondent states that the rule gathered from the foregoing authorities is, that if the owner performs any work on the vessel while laid up for repairs which are a *benefit* to the vessel that it is liable to the apportionment of the damages for the demurrage. This as we have seen in all the cases, is not the real test. The

real test, and the just one, is the question of the necessity for the repairs before the collision.

The benefit received is incidental and is not regarded. It is different from the case of insurance as was said in

*The Baltimore v. Rowland*, 8 Wall. 377.

“Restitutio in integrum is the leading maxim in such cases and where repairs are practicable the general rule followed by the admiralty courts in such cases is that the damages assessed against the respondent shall be sufficient to restore the injured vessel to the condition in which she was at the time the collision occurred; and in respect to the materials for the repairs the rule is that there shall not, as in insurance cases, be any deduction for the new materials furnished in the place of the old, *because the claim of the injured party arises by reason of the wrongful act of the party by whom the damage was occasioned, and the measure of the indemnification is not limited by any contract, but is co-extensive with the amount of damage.*”

From the foregoing cases, and especially the cases cited and quoted from by the respondent, the apportionment of the demurrage charges is found to be based upon the question of whether the repairs would have been made in the absence of the collision, and thus the vessel detained. The repairs in this case would not have been made but for the collision.

We believe that the cases of *The Sequoia*, *Ruabon Steamship Company v. London Assurance Company*, and *The Acamphus*, supra, clearly show that under the facts as they exist in this case, there should be no apportionment of the demurrage charges, for, as we

have pointed out, in all of these cases it is not the question of the material benefit derived by the owner, but rather the necessity or legal obligation of the owner to make the repairs prior to the date of the collision, or in the very near future, which imposes the duty to apportion the charges, and in *The Baltimore* above, the distinction is drawn between an indemnification limited by contract and an indemnification arising from a wrongful act of the party in fault.

In the present case it is positively shown that at the time of the collision the ship was seaworthy, and that the only reason for making the repairs on the engines and overhauling the same was for examination as to the result of the collision upon her engines. As we have said, though not endorsed by the surveyors, it was an act of prudence upon the part of the owners, and though by reason of the stipulation entered into by the parties in regard to the repairs, they were bound by the advice of the surveyors and thus not entitled to receive the costs, we do not think that the owners should be penalized for taking these reasonable precautions. That should certainly be true inasmuch as the respondents have lost no time and have been put to no expense on account of it.

The making of the repairs in this case having caused the respondent no delay, no cost other than that which it was bound to pay,—the making of the repairs comes in the same category as though the owners were making a survey of the ship or washing down the decks of the vessel, and justice requires that no apportionment of the demurrage charges be made.

The suggestion of one-third off on <sup>this</sup> account in any event is unreasonable. The cost is no <sup>^</sup> criterion.

Upon an entire consideration of the case, we respectfully suggest that judgment should go for the appellant as prayed for in our conclusion to the original brief, pages 49 and 50.

Dated, San Francisco,  
November 25, 1922.

Respectfully submitted,

NATHAN H. FRANK,

IRVING H. FRANK,

*Proctors for Appellant.*



No. 3906

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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AKTIESELSKAPET BONHEUR (a corporation),	}
<i>Appellant,</i>	
vs.	
SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY	}
(a corporation), claimant, of the American	
Steamer "Beaver", her tackle, apparel, en-	
gines, boilers, furniture, etc.,	
<i>Appellee.</i>	

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BRIEF FOR APPELLEE IN ANSWER TO  
APPELLANT'S REPLY BRIEF.

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FARNHAM P. GRIFFITHS,  
McCUTCHEN, OLNEY, WILLARD, MANNON & GREENE,  
*Proctors for Appellee.*

FILED

DEC 9 - 1922

F. D. MONKTON,  
CLERK



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vs.

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(a corporation), claimant, of the American  
Steamer "Beaver", her tackle, apparel, en-  
gines, boilers, furniture, etc.,  
*Appellee.*

## BRIEF FOR APPELLEE IN ANSWER TO APPELLANT'S REPLY BRIEF.

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We refer in this brief to appellant as libelant and to appellee as respondent, thus following for convenience the designations used in the preceding briefs.

It would seem hardly necessary to remark (in reference to the opening paragraphs of the brief under reply) that of course we have no thought but that the case should be decided on the evidence in the record and the law applicable to it. The phrase or two to which exception is taken were used quite incidentally as not unfairly descriptive, we think, of certain aspects of

the case. The owners of the "Bayard" whom the District Court said:

"were in fact unwilling to accede to the regulations of the Shipping Board in regard to rates and seemingly desired to take their chances of getting higher rates later by leaving the ship idle during this period"

were surely at least "*to all intents and purposes* (and that was our phrase) defying" the government, and we certainly think that in asking our courts to give it the damages it claims here (based on the war-time market as it would have been but for the regulation of the Shipping Board) libellant is in effect asking that the courts give it the profit it would have reaped had it been able to make its defiance effective. Counsel himself puts libellant's position as "seeking the market rate for his vessel" meaning the rate as it would have been in the absence of governmental war-time regulation, the regulated rate being far lower. There were owners of sugar and flour like owners of ships, who preferred not to sell unless they could sell at unrestricted war prices (the "market" as counsel calls it) and the word that has come to describe that attitude is "profiteering". Of course libellant was entitled to pursue that course but, doing so, can hardly object to a description of the situation by the word that was made for it.

"Judicial notice" of these mounting war-time charter rates was sanctioned in *The Orion*, 239 Fed. 301, which is cited approvingly in libellant's own reply brief at page 25, so we cannot follow the exception



to our reference to it (Brief for Appellee, Appendix, p. V).

We now leave libelant's introductory paragraphs and come to the points in its reply argument.

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# I.

## THE QUESTION OF BURDEN OF PROOF AND THE PROOF THAT IS IN FACT IN THE RECORD REGARDLESS OF BURDEN.

We do not see that so much importance attaches now to this question as libelant seems to think. The fact is that the case is in and whether it was libelant's burden to prove its claim or ours to negative it in first instance is not of large import now; for as we view the record and as the District Court found the claim *has* been negatived. The proofs went in, whether from us or libellant it is now, it would seem, practically immaterial, for they show and the evidence and the District Court's finding is that the Moore charter would not have been approved; that berthing for owners' account would not have been approved; that the only market was at the basic rate approved by the Shipping Board, and that the "Bayard" would have remained idle had the collision never occurred, rather than accept that market. On this state of the record libelant was properly denied any demurrage by the District Court whose decision is unaffected by any question of burden of proof.

We may say, however, that in so far as the question burden of proof of demurrage may still play any part

in the case as it stands we cannot concur in the point of view taken in libelant's reply brief.

It seems to be suggested that we were contending that libelant was required in first instance to negative all our objections to the demurrage or using libelant's words

"to prove that the vessel would *not* have been prevented by the Shipping Board from sailing under the charter, thus throwing upon the libelant the onus of proving a negative. In fact requiring the libelant to negative the respondent's defense before respondent had established any defense". (Appellant's Reply Brief, p. 3.)

That is an astute but hardly a correct way of stating the position. The controversy in the case is not upon an affirmative defense pleaded by us. The issue on the damages claimed for demurrage is joined by libelant's pleading in Article VI of the libel that

"the said owners will be further damaged by the detention of said vessel during the time required for her repairs in the loss of the use of said vessel" (Ap. p. 7)

and by our denial thereof in Article VI of the answer:

"Claimant denies that the owners of said 'Bayard' will be or were further damaged by the detention of said vessel during the time required for her repairs in the loss of the use of said vessel." (Ap. p. 12.)

The burden of proof on facts thus alleged by a plaintiff or libelant and denied by a defendant or respondent is always, and from start to finish of the case, with the plaintiff or libelant, and was and is with libelant here on this issue of demurrage. And when the end of the

case comes the "risk of non-persuasion" to use the illuminating phrase employed by Wigmore as the equivalent of "burden of proof" (Evidence, Sec. 2485) is always with the plaintiff or libelant as the moving party. What shifts as the case progresses is not the burden of proof in the true sense but merely the duty of going forward with the evidence.

*Thayer: Preliminary Treatise on Evidence*, p. 355, ff.;

*Wigmore on Evidence*, Sec. 2485;

*The Monongahela*, 282 Fed. 17 (C. C. A. Ninth Circuit, June 1922).

The following passages from Chapter IX (The Burden of Proof) of Thayer's Treatise *supra* put the point vividly:

"In legal discussion, this phrase, 'the burden of proof', is used in several ways. It marks, (1) The peculiar duty of him who has the risk of any given proposition on which parties are at issue,—who will lose the case if he does not make this proposition out, when all has been said and done. In saying 'the peculiar duty', I mean to discriminate this duty from another one, called by the same name, which this party shares with his adversary. (2) It stands for the duty last referred to, when discriminated from the other one; that is to say, the duty of going forward in argument or in producing evidence; whether at the beginning of a case or at any later moment throughout the trial or the discussion. (3) There is an undiscriminated use of the phrase, perhaps more common than either of the other two, in which it may mean either or both of the others." (p. 355.)

"In general, he who seeks to move a court in his favor, whether as an original plaintiff whose

facts are merely denied, or as a defendant, who, in admitting his adversary's contention and setting up an affirmative defence, takes the role of *actor* (*reus excipiendo fit actor*), must satisfy the court of the truth and adequacy of the grounds of his claim, both in point of fact and law. But he, in every case, who is the true *reus* on defendant holds, of course, a very different place in the procedure. He simply awaits the action of his adversary, and it is enough if he repel him. He has no duty of satisfying the court; it may be doubtful, indeed extremely doubtful, whether he be not legally in the wrong and his adversary legally in the right; indeed he may probably be in the wrong, and yet he may gain and his adversary lose, simply because the inertia of the court has not been overcome; because the *actor* has not carried his case beyond an equilibrium of proof, or beyond all reasonable doubt. Whatever the standard be, it is always the *actor* and never the *reus* who has to bring his proof to the required height; for, truly speaking, it is only the *actor* that has the duty of proving at all. Whoever has that duty does not make out a *prima facie* case till he comes up to the requirement, as regards quantity of evidence or force of conviction, which applies to his contention; and, of course, he has not, at the end of the debate, accomplished his task unless he has held good his case, and held it at the legal height, as against all counter proof. This duty, in the nature of things, here as well as at Rome, cannot shift; it is always the duty of one party, and never of the other. But as the *actor*, if he would win, must begin by making out a case, and must end by keeping it good, so the *reus*, if he would not lose, must bestir himself when his adversary has once made out his case, and must repel it. And then, again, the *actor* may move and restore his case, and so on. This shifting of the duty of going forward with argument or evidence may go on through the trial. Of course, as has been said already, the thing that thus shifts



and changes is not the peculiar duty of each party,—for that remains peculiar; i. e., the duty, on the one hand, of making out and holding good a case which will move the court, and on the other, the purely negative duty of preventing this. It is the common and interchangeable duty of going forward with argument or evidence, whenever your case requires it.” (pp. 369-370.)

“There is much ambiguity in what is said of the ‘shifting’ of the burden of proof. As to this it is vital to keep quite apart the considerations applicable to pleading, and those belonging to evidence. We see that the burden of going forward with evidence may shift often from side to side; while the duty of establishing his proposition is always with the *actor*, and never shifts. As we have only one phrase for two ideas belonging to two different subjects, we say, as it happens, that the burden of proof does, and does not shift.” (p. 378.)

Libelant here essayed to make its proof by showing that Moore & Co., had offered to charter the “Bayard” but both Mr. Moore and libelant’s agent, Mr. Kutter, testified that the charter would have to have the approval of the government before the “Bayard” could sail under it (Ap. pp. 19, 20, 121-123). Without that approval the mere offer of the charter made no case, even *prima facie*, for libelant (Appellee’s Brief, pp. 58-60 and appendix thereto, pp. V-VIII). And the same would have been true of any attempted berthing for owner’s account (Appellee’s Brief, pp. 71-77).

Thus libelant never proved the market claimed by it even *prima facie*. Or if it did, that *prima facie* proof was overcome when we came to go forward with the

evidence which showed that that alleged market was *not* available and that the only market which *was* available was the 45 schilling per deadweight ton per month rate sanctioned by the Chartering Committee of the Shipping Board. That market, the evidence further showed, libelant would not have taken preferring to keep the "Bayard" idle in hope of higher rates later on. Libelant therefore never proved what it plead and we denied: that it suffered damages for detention of its vessel in consequence of this collision. That is the sum and substance of the decision appealed from. And the gist of it all at bottom is that libelant did not make out or sustain that fundamental never shifting burden of proof, as distinguished from the duty of going forward with the evidence which may move from one party to the other as the case progresses.

With the foregoing as background there would seem to be no great difficulty in dealing with the cases. We have contended that the burden of proof in this case rests on libelant, citing in the Brief for Appellee (pp. 10-11).

*The Potomac*, 15 Otto 630; 26 L. Ed. 1194;

*The Conqueror*, 166 U. S. 110; 41 L. Ed. 937;

*The Clarence*, 3 W. Rob. 283;

*The Loch Trool*, 150 Fed. 429;

*The North Star*, 140 Fed. 263; 151 Fed. 168.

To which we now add

*The Watuppa*, 283 Fed. 8,

decided by the Circuit Court of Appeals for the Second Circuit in June of this year and published in the

Federal Reporter Advance Sheets of November 23, 1922. On proof of demurrage the court says:

*“In respect to damages based upon loss of earnings of the vessel while she was undergoing repairs, there must be clear proof that there would have been such earnings, if the collision had not occurred.”*

If we correctly follow libelant's comment on these cases it does not question that libelant has the initial burden of proof, and the divergence between us would seem to be as to how far libelant must proceed before it comes to us to go forward with the evidence. For libelant, of course, does not question the authority of these cases which are in accord with the view expressed by Dr. Lushington in

*The Clarence*, 3 W. Rob. 283.

“The question which I have to determine is not the rate at which such a vessel as *The Clarence* might be hired, but how much the company have actually lost by her detention whilst under repair. Upon this point the affidavit of Mr. Pratt is altogether defective, and he does not venture to swear that the company have sustained one single shilling of direct and actual loss. In order to entitle a party to be indemnified for what is termed in this court a consequential loss, being for the detention of his vessel, two things are absolutely necessary—actual loss, and reasonable proof of the amount. Both must be proved, for the registrar and merchants cannot report a loss sustained without evidence. The second witness, Mr. Adams, who states himself to have been a manager of a steam company, and well acquainted with the earnings of steam-vessels, does not advance the case in the slightest degree. He leaves it exactly where it was left by Mr. Pratt, and does not prove

any direct or actual loss at all. Under these circumstances I have no hesitation in saying that I must overrule the objection which has been taken, and confirm the report of the registrar. The objection, it appears to me, has been founded upon a misapprehension of the principle upon which the court proceeds in assessing the amount of damage. It does not follow, as a matter of necessity, that anything is due for the detention of a vessel whilst under repair. Under some circumstances, undoubtedly, such a consequence will follow, as, for example, where a fishing voyage is lost, or where the vessel would have been beneficially employed. The *onus* of proving her loss rests with the plaintiff, and this *onus* has not been discharged upon the present occasion. Had the owners of The Clarence proved that the vessel would have earned freight, and that such freight was lost by the collision, the case would have fallen within the principle to which I have last adverted; I therefore pronounce against the objection, and confirm the report with costs."

Libelant emphasizes, however, that the cases cited require that it should prove the *market* and the *amount* of the profits claimed and apparently conceives that that is the extent of the burden required of it. As we read the language of the cases it does not seem to us to be so limited, but granting for argument, without otherwise conceding, that it does, we hold that libelant in the case at bar never proved the *market*. The mere *offer* of the Moore charter without proof of its concededly indispensable adjunct—that it would have received the approval of the Shipping Board—was not proof of a *market* for the Bayard or of the *amount* of her alleged loss. The situation is the same if the claim be founded on *market* and *amount* on the basis



of berthing for owner's account. Approval of it would have been required and could not have been received (Appellee's Brief, pp. 71-77).

But if our view is erroneous and libelant is correct in the claim we understand it to make that, assuming the burden of proof, it made its *prima facie* case by proof merely of the *offer* of the Moore charter and that the duty of going forward with the evidence (inaptly called burden of proof) then shifted to us to show that the Moore charter would not have been approved—we hold that we made that showing. In other words, without going over again the evidence reviewed in our major brief, we think as there stated, that, apart altogether from any question of burden of proof, the record shows that the Moore charter would not have been approved, nor would berthing for owner's account.

That left libelant with its initial plea for demurrage—its general burden of proof in the true sense that the burden is always with the moving party—unsustained, unless libelant should again go forward with the evidence and overcome our showing—which it did not do.

On the contrary, in connection with our showing that the Moore charter and berthing for owner's account would not be approved, we proved that the only available market was that at the rate approved by the Shipping Board—45 shillings per deadweight ton per month. And we showed further that libelant would have been unwilling to accept that market and would and did, in preference, keep the "Bayard" idle as the Brazil was kept idle. Without reviewing again the

evidence or repeating the argument we refer to appellee's brief in chief (pp. 78-92).

As we have said, therefore, the question of burden of proof does not, with all the evidence in, seem to be of any very great significance. It will be noted by review of the headings in appellee's brief in chief that while we asserted that libelant had not sustained what we conceived to be its burden of proof we coupled the assertion with the further claim, in which we think the record bears us out, that, apart from burden of proof, the evidence showed that libelant was not entitled to any demurrage.

The comment of libelant on the cases we cited to the point that the loss claimed must be shown *with reasonable certainty*, thus also has now only at most an academic interest as apart from any burden the evidence shows that libelant sustained no damages. We think

*The North Star*, 151 Fed. 168,

and

*The Winfield S. Cahill*, 258 Fed. 318,

both cases from the Circuit Court of Appeals for the Second Circuit amply sustain our contention, the latter being particularly in point because it involved as does the case at bar, the question whether the government would have allowed the vessel to sail under the charter on which her demurrage claim as here was based (Appellee's Brief, pp. 16-17).

In *The North Star* the Commissioner rejected the testimony of libelant's agent that he would have ac-

cepted certain proffered charters but for the collision and held it inherently improbable that in view of the approaching close of the season of navigation the charters would have been accepted. Incidentally the Circuit Court of Appeals remarked respecting the conclusion of the Commissioner:

“We think the commissioner was justified in rejecting this statement, and in reaching the conclusion that the two charters were not accepted because the libelant was unwilling to send out any of its vessels at so late a day as December 2d, and was therefore unwilling to contract. The functions of a commissioner, to whom it has been referred to take the evidence and report his opinion to the court respecting damages, are analogous to those of masters in chancery (Admiralty Rule 44), and his findings upon questions of fact depending upon conflicting testimony, or upon the credibility of witnesses, should not be disturbed by the court of revision, unless they are clearly erroneous.”

(151 Fed. p. 177.)

*A fortiori*, we should think, this court would be disinclined to disturb the district court's finding that the “Bayard” would have been idle in any event.

Ignoring *The Winfield S. Cahill*, *supra*, and commenting (and at that incorrectly as we shall presently show) only on *The Wm. M. Hoag*, 101 Fed. 846, libelant purports to dismiss our authorities on the reasonable certainty with which demurrage should be shown as “largely inferior court cases” (Appellant's Reply Brief, p. 9). The cases on which we laid chief stress in this connection were *The North Star* and the *Winfield S. Cahill* above mentioned and to these we might now add *The Watuppa*, 283 Fed. 8, all from the Circuit

Court of Appeals for the Second Circuit. We cited also briefly in the same connection *The Conqueror* from the United States Supreme Court (166 U. S. 110), *The Clarence* from Dr. Lushington (3 W. Rob. 283) and *The Tremont* from this Circuit Court of Appeals (161 Fed. 1). The district court cases cited were in accord with these higher courts.

The suggestion that "the cases relied upon by respondent are largely inferior court cases" (Appellant's Reply Brief, p. 9) is hardly borne out. Following the foregoing remark about "largely inferior court cases" libelant says:

"The cases following are from courts of great authority, and if they conflict with respondent's cases they are for that reason preferable and more persuasive than those of respondent."

Libelant then proceeds to discuss one case from the Circuit Court of Appeals for the First Circuit, which is not in point; and three English cases which are only very indirectly in point, as they were primarily concerned with the very special questions of demurrage to public vessels.

The Circuit Court of Appeals case is

*Randall v. Sprague*, 74 Fed. 247.

It was not a case of collision at all but of demurrage under a charter party. Of course demurrage under a charter party whether by way of stipulated demurrage or damages for detention is not ordinarily suspended by the vessel's enforced idleness, just as her charter hire is not interrupted even by delays due to mutually excepted causes except where the charter party



specifically provides for cessation of hire as in the familiar breakdown clause.

*American Asiatic Co. v. Robert Dollar Co.* (Sept. 5, 1922, C. C. A. Ninth Circuit), 282 Fed. 743.

In *The Greta Holme*, VIII Aspinall's Maritime Cases, N. S. 317, the question involved was, as above suggested, whether a public vessel damaged in a collision was entitled not only to the cost of her physical repairs, but also to demurrage. Theretofore, apparently, demurrage had not been allowed to public vessels upon the theory that it could not be shown that their owners had sustained a tangible pecuniary loss. The craft involved in the collision was a dredger, operated by the Mersey Docks and Harbour Board. The House of Lords found that while of course this board was not earning profits with the dredge, nevertheless her loss of use was necessarily a cost to the rate payers who maintained her through the board and as the parties to the action wished the case not to be sent back to the registrar for the assessment of damages, the House of Lords fixed them. There is nothing in the case to suggest that demurrage would have been allowed if the dredger had been idle instead of being in active operation at the time of the collision.

Again, in *The Mediana*, IX Aspinall's Maritime Cases, N. S. 41, the vessel involved in the collision was one of a fleet of light-ships maintained by the Mersey Docks and Harbour Board. That board also kept a stand-by or substitute light-ship which was put in the place of the damaged vessel after the collision. The expense of maintaining the substitute light-ship was proved, and

the parties agreed upon the *amount* claimed in respect to hire of the services of this substitute light-ship as the measure of the loss of the use of the damaged light-ship—reserving the question whether such claim was recoverable. It was held that it was, thus settling in England it would seem, that demurrage is due where a regular stand-by ship is used, though a leading English authority says this is not so where a temporarily idle ship is used.

*Roscoe on Damages in Marine Collisions*, 2nd Ed.,  
pp. 98, 99.

No such distinction is made in the American cases, where the general rule is applied that an owner using a substitute ship in place of a ship damaged in a collision, is entitled to demurrage.

*The State of California*, 54 Fed. 404.

The mention of the last named case leads us to digress to say that we cannot agree with libellant's statement on page 8 of its reply brief that *The Wm. M. Hoag*, 101 Fed. 846, is in direct conflict with the decision in *The State of California*. Admittedly the American rule allows damages, as we have said, for demurrage, even though a stand-by vessel is used as a substitute for a disabled vessel. In *The Hoag*, however, demurrage was denied because the damaged vessel—"The Lurline"—was injured while at a dock undergoing repairs and could not conceivably be held to have suffered a detention. The steamer "Undine" had taken the place of the "Lurline" upon the latter's route prior to the accident, and the only effect of the accident, so far

as the question of demurrage was concerned, was to continue the "Undine" where she was until the repairs on the "Lurline" were completed; it being the intention, upon the return of the "Lurline" to her route, to place the "Undine" upon the dock for repairs. This was not therefore a case of substitution of a stand-by vessel at all but of injury to a vessel which was idle at her dock and of the continuance on her run of another vessel which would herself otherwise have been idle at the dock for repairs. Libellant misapprehends the relation of *The State of California* to *The Wm. M. Hoag*.

From this digression we proceed to the last of libellant's English cases, namely, *The Astrakhan*, 11 Aspinall's Maritime Cases, N. S. 390. In that case the Probate, Admiralty and Divorce Division of the High Court of Justice held that where a Danish war vessel was injured in a collision it could not be said that she was not in the employment of her government, because it was not a time of war, as war vessels are used by governments for various other purposes. This, of course, is notorious.

None of the cases thus cited by libellant seem to us to be in conflict with our point that

"the proof required is a showing to reasonable certainty that the vessel but for the collision would have been employed and would have earned the profits claimed" (Brief for Appellee, p. 11),

nor with our cases adverted to above which we think sustain that view. Certainly the vessels in all the English cases were shown to have been employed,

and as we have stated, libelant's one American case (*Randall v. Sprague*, 74 Fed. 247) is not a collision case at all, but a demurrage case, and not in point.

If it be libelant's suggestion that its initial burden of proof did not require it to show the employment, but that it was for us upon going forward with the evidence to show non-employment, we claim, as before stated, that that showing has been made in the case at bar (Brief for Appellee, pp. 78-92).

Libelant surely does not contend literally and apart from context for the italicized sentence from *The Mediana*, on page 12 of its reply brief, viz.:

“For the wrongdoer has no right to inquire what or whether any use would have been made of the vessel of which the respondents were deprived.”

If it does so contend it is asking this court to follow an English authority against the United States Supreme Court, for it was certainly held in *The Conqueror*, 166 U. S. 110, that a vessel which would have been idle in any event may not have demurrage.

“Again, the court may properly take judicial notice of the fact that the yachting season in our northern waters practically comes to an end before the 1st of November, and, as the *Conqueror* was seized on August 27, during more than one-half the time for which demurrage was allowed she probably would have been laid up at her wharf. It is true there was a possibility that her owner might have desired her for use in a winter's cruise to tropical waters; but there was not the slightest evidence of that, and the contingency of her being so used was too remote to justify an allowance upon that basis.”



Indeed it is a question how far these English authorities are of value in demurrage cases in our courts, in view of the Supreme Court's decision in *The Conqueror* that demurrage is not due for the detention of a private yacht which has not been used commercially; and certainly even with the interpretation placed upon *The Conqueror* in *The Vanadis*, 250 Fed. 1010 (Appellant's Reply Brief, p. 5 where the quotation from *The Vanadis* is mistakenly ascribed to *The North Star*) the demurrage damages claimed for a yacht must be proved with far more certainty than these English cases suggest. We think it open to question whether *The Vanadis* can be reconciled with *The Conqueror* at all, but certainly upon no other basis than that the damages were very definitely proved in *The Vanadis* by showing that \$13,000.00 a month had been offered for the yacht for two preceding seasons; that such vessels were scarce and in demand at the time and that her charter value was \$11,000.00.

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## II.

**MR. SMULL'S TESTIMONY. THE EVIDENCE SHOWS THAT THE CHARTERING COMMITTEE WOULD NOT HAVE APPROVED THE MOORE CHARTER. THE TRANSVAAL.**

**Mr. Smull's testimony.**

For answer to the second division of the Reply Brief for Appellant (p. 14), so far as it concerns the testimony of Mr. Smull, we need do little more than refer to pages 35 to 51 and 58 to 71 of Appellee's Brief in chief. We called attention at page 37 thereof to

the fact that counsel was considering Mr. Smull's testimony in part only, ignoring the positive testimony that if the Moore Charter worked out at more than the basic rate, as it did, it would not have been approved (Appellee's Brief, p. 41). The basic rate was the *sine qua non* of approval of charters except of neutral vessels in foreign ports, to which the board had to make concessions to get them into American ports and thus within the committee's jurisdiction. As counsel persists in dealing with an insulated fraction in Mr. Smull's testimony, apart from context, deliberately ignoring, even after the matter has been called to his attention, the testimony regarding the basic rate and the unalterable and invariable insistence upon it, his comments on that testimony both in his first and reply brief convey an utterly erroneous impression of Mr. Smull's evidence. Without further comment in this connection we ask only that the court read Mr. Smull's testimony and the pages of our major brief given above. We believe that upon such reading it will come to the conclusion so clearly reached by the District Court that the Moore charter would not have been approved.

### **Disapprovals.**

Libellant says there were no disapprovals (Reply Brief, p. 15). It overlooks the disapprovals of the American Asiatic Company's offer for the "Bayard" of two hundred and seventy thousand dollars and of the offer of one hundred and seventy thousand dollars for the Arabien (Ap. pp. 196-197 and Appellee's Brief, pp. 60-71).

### **The Transvaal.**

We need add nothing to the discussion of *The Transvaal* at pp. 52-58 of Appellee's Brief, except to say that that charter is immaterial, not merely because it does not fall within the period examined into on the New York depositions (Appellant's Reply Brief, p. 16) but because it is altogether outside the period examined into in the case at all. One might as well pick out a charter a year or two years after the detention period as three months afterward when for aught we know the circumstances were altogether different.

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### III.

#### **THE DISPUTED ITEMS OF ALLEGED DAMAGE NOT INCLUDED IN THE STIPULATED PHYSICAL DAMAGES.**

The argument made by libellant (Reply Brief, pp. 18-19) based on *The Conqueror*, 166 U. S. 110, is specious and unsound. *The Conqueror* was wrongfully detained and demurrage was denied her, not because she would have been idle in any event, but because she was a pleasure yacht and no pecuniary damages for loss of time could be or were proved. But the "Bayard" has been denied demurrage on the District Court's holding that she would have been idle in any event and that the expenses now claimed would have been incurred even if the collision had never happened. Ordinarily, as we all know, allowances are made in conjunction with damages for demurrage for wages and keep of such members of the crew as are reasonably

kept by the ship, and of watchmen, if and to the number that it be reasonable under the circumstances to employ them. See

*The A. A. Raven*, 231 Fed. 380,

where, as in *The Conqueror*, such allowances were made as were found reasonable and where demurrage would have gone hand in hand with those allowances except that the government which owned the vessel "is not claiming for loss of profits, or for losing the use of the dredge" (231 Fed. at p. 388).

In other words, expenses of the character under discussion, if reasonable, go hand in hand with demurrage as part of the *restitutio in integrum*.

It is only fortuitously, therefore, as in *The Raven* and *The Conqueror*, that expenses of the type under discussion are allowed *without* demurrage. Ordinarily they are awarded together. They stand or fall together.

*The Tremont*, 161 Fed. 1.

They would have gone hand in hand with demurrage in the *A. A. Raven*, *supra* had the government asked demurrage and in *The Conqueror*, *supra* had her owner been able to prove pecuniary loss for the detention which he undoubtedly sustained to a vessel that he would otherwise have been using at least during half the repair period.

*The Conqueror* is not authority for allowance of the claimed expenses here where the District Court found that the "Bayard" would have been idle anyway. To deny demurrage as it did on the last named ground and allow the expenditures mentioned would have in-



volved a fallacy which the District Court detected in disallowing the items.

Even if the other items were allowed it may be questioned whether those for the watchmen should be included in the absence of a showing that they were necessary when the crew of thirty men were standing by.

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#### IV.

##### **BERTHING FOR OWNER'S ACCOUNT.**

It goes without saying that we have no disposition to misstate libelant's position. We might point out that the district court referring in its opinion to the proffered Moore charter said that:

“It is on this offer that libelant bases its claim for the amount of damages sought as demurrage.”  
(Ap. p. 304.)

And the language on page 47 of the Brief for Appellant which is identical with that used by libelant in its brief in the court below would seem to justify this conclusion on our part and on the part of the district court. That language, following the figures claimed for demurrage on the basis of the Moore charter, is: “For which amount we claim judgment with interest”; and the other computations were seemingly for illustration.

In any event the berthing for owner's account like the Moore charter would have been disapproved (Appellee's Brief, pp. 71-77).

Appellee's Reply Brief does not deal with Sections A and B of the Appendix to our major brief. The discussions of sections D and C of that Appendix are answered in an Appendix to this brief as these considerations are material only in the event of a reversal of the decree of the district court disallowing demurrage and form no part of the major argument.

We respectfully submit that the decree should be confirmed both in respect to the disallowance of demurrage and to the disputed items connected with physical damages and that we should have the costs of this appeal.

Dated, San Francisco,

December 9, 1922.

Respectfully submitted,

FARNHAM P. GRIFFITHS,

McCUTCHEM, OLNEY, WILLARD, MANNON & GREENE,

*Proctors for Appellee.*

(APPENDIX FOLLOWS.)

## **Appendix.**





## Appendix

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### THE QUESTION OF OVERTIME OR DOUBLE SHIFTS.

The situation in respect to this matter was set forth in pages xx to xxiii of the Appendix to Appellee's Brief together with the authorities which required libellant to repair his ship with diligence. If appellant's ship was worth \$4200.00 a day, overtime and double shifts should have been used.

Appellant urges in reply, first, that we are estopped from saying that double shifts or overtime should have been used, because of the agreement, between the parties. We quote the agreement entire, italicizing the parts which appellant omits in its quotation, for we deem them significant:

“If the repairs to the ‘Bayard’ of the injuries resulting from her collision with the steamer ‘Beaver’ are repaired by the Union Iron Works Company on the basis of time and materials at going rates, the owners and underwriters of the ‘Beaver’, if that vessel is ultimately held liable for the collision, will not question the propriety of that method of repair. *This is entirely without prejudice to the question of liability for the collision.*”

To further eliminate as far as possible controversy over the character of repairs to be made, we suggest that it would be well to permit the surveyors for the owners and underwriters of the ‘Beaver’ to join with the surveyors for the owners and underwriters of the ‘Bayard’ in preparing specifications for the repairs. *This, also, is without prejudice to the question of liability for the collision.*” (Apostles, p. 323.)

Noting the italicized sentences, we beg to call to the court's attention that at the time of the agreement and at the time the repairs were made, liability for the collision was undetermined. Appellant was, under the settled rule, in duty bound to minimize the loss. This the appellant knew best how to do, and it was not for appellee to prescribe overtime when the bills, so far as known then, might have to be paid by the "Bayard's" owners.

The agreement was a convenience to the "Bayard's" owners to enable them to repair the vessel on the basis of time and materials at going rates at the Union Iron Works without the anxiety of having to prove that she could not have been repaired under contract, or that contract repair would not have been less expensive, or that the repairs could not have been made more reasonably at some other place. This was a courtesy to the appellant, which otherwise would have been annoyed with the usual difficulties of proving damages.

The phrase "going rates" does not denote straight time. It has no significance in respect to straight or overtime but refers to cost on either basis (Evers, Apostles pp. 281-282).

Appellant argues that we should have specified overtime if we wanted it. That was not our business. We had not then admitted liability. Certainly we could not object to overtime if it reduced the damages. Whether it would or would not we were not in the position to know.

Appellant cites the high rates then prevailing and quotes from the opinion in

*The Orion*, 239 Fed. 301,

that

“all the world, even a judge, knows that freight rates have been steadily rising ever since the fall of 1914, and that every ship which could safely float has been in constant demand”.

But the “Brazil”, under the same managing ownership, was then or shortly after, idle in San Francisco harbor for two months. How could appellee know that the owners of the “Bayard” intended to use her? The high demurrage demand in the libel meant nothing. Certainly we could not be expected to anticipate that appellant was intending a serious claim for demurrage at far more than double the vessel’s then market value (which was the approved Shipping Board 45-shilling rate), and at which reasonable value overtime might well not be justified. But the owners knew the situation. And if the “Bayard” was worth the vast figure they claim and they intended to use her, they should have employed overtime, for, as we have pointed out, liability for the collision was then undetermined. The simple significance of the nonuse of overtime is that the “Bayard” was going to be idle anyway and her owners knew it. They were not proposing to sail at Shipping Board rates.

The final answer to the contention that the agreement prescribed straight time is that, despite the agreement, overtime was in fact used for three days, on the dry-dock (Blackett, Apostles pp. 260, 269; Evers, Apostles

p. 276), and without our agreement or suggestion (Blackett, Apostles p. 269).

This also effectually disposes of the contention that if overtime was desired our surveyors should have suggested it. By reference to the agreement quoted it will be observed that the surveyors were authorized only

“to join with the surveyors for the owners and underwriters of the ‘Bayard’ in preparing specifications for the repairs”,

without prejudice. Thereafter they were at the yard only off and on to see that repairs were made within the specifications. Counsel’s suggestion that they were directing or supervising the work is groundless. With liability still undetermined, how could they presume to propose overtime which the “Bayard’s” owners might have to pay for?

Captain Bryn of the “Bayard” admitted that he kept Messrs. Blackett and Evers, representing the “Beaver’s” underwriters,

“fairly acquainted with the repairs as they were going on, and both of these men were down at the Union Iron Works, where they had their work at the same time in other ships as well, and they came down and looked at my ship *once in a while*”. (Apostles p. 39.)

Mr. Blackett and Mr. Evers both testified that it was no part of their business to suggest the use of overtime (Blackett, Apostles p. 270; Evers, Apostles p. 278).



**The contention that this is an underwriters' suit and that the underwriters object to paying overtime.**

On the premise that underwriters normally object to paying overtime, as Mr. Blackett and Mr. Evers correctly stated, appellant argues that therefore the underwriters on the "Beaver" would have objected to paying overtime on the "Bayard". The argument is erroneous because it confuses that part of the marine insurance policy which insures the vessel concerned against loss or damage to her hull or machinery, with the collision clause, which insures her against liability to another vessel with which she collides.

The insurance against loss or damage to a vessel's own hull or machinery does not include demurrage. The insured vessel being injured, the underwriters pay the bill for physical damages, but the demurrage is for the owner's account. That is fundamental. Consequently, the general rule of the underwriters, as the surveyors testified in this case, is not to pay overtime. Reduction of demurrage is of no interest to the underwriters. While that is a general rule, if the owners can show that the overtime is a reasonable expense under the circumstances, the underwriters pay it under the average adjustment. Mr. Evers explained the situation very clearly at pages 278, 279 of the Apostles, but counsel for appellant seemed not to follow him because they were at cross purposes. Mr. Evers was explaining the underwriters' attitude toward the use of overtime in repairing the vessel that the underwriters directly insured; he was not referring to their attitude towards overtime in repairing a vessel in which the

underwriters become subsequently interested because of their insurance on the first vessel against collision liability. Counsel had in mind the second situation, whereas Mr. Evers was thinking of the first situation, and throughout the deposition counsel erroneously applied the statement that "underwriters do not pay overtime" to the situation of the vessel which the underwriters have not insured at all, and in which they become interested only by virtue of the collision liability insurance.

To put the matter concretely, the statement that the underwriters do not pay overtime would be normally applicable, so far as the "Bayard" was concerned, *to her own underwriters*, not to the underwriters on the "Beaver".

If the collision insurance (by virtue of the collision clause in the hull policy) like the major insurance in the hull policy against damage to hull or machinery, did not cover demurrage, then the "Beaver's" underwriters would not be interested at all in this contest, for demurrage alone is here at issue. But being obligated to meet a collision liability—the judgment if you will—it is senseless to say that the underwriters will not pay overtime. They will and must pay the judgment, and overtime is an immaterial consideration, except that, obligated as they are to meet *liability*, they are entitled to insist through the respondent that it insist that the damages be minimized—that overtime shall be used if the demurrage be high.

Appellant's argument is plainly fallacious. We urge, that two shifts should have been used if the "Bayard"

had the high value which her owners claim, or if two shifts were not possible, certainly overtime. A \$4200 a day ship! Dilatory repair! How are they reconcilable?

#### **The reference to a Commissioner.**

We confess to some astonishment at the opposition expressed by appellant (Reply Brief, pp. 33-35) to a reference to the Commissioner for determination of the saving by overtime or double shifts or on account of owner's repairs should these considerations become material.

References to the Commissioner on matters of damages involving calculations, etc., are so common in the admiralty practice as to be accepted practically as a matter of course by the admiralty bar and the admiralty court.

Libelent itself made no attempt to prove its damages in the court below. The impression sought to be conveyed on page 34 of Appellant's Reply Brief that an agreement was entered into respecting the physical damages before the case was finally submitted and arrangements regarding filing of the briefs is incorrect. The court ordered a reference in the decree to determine the amount of the physical damages if the parties should not be able to agree upon it (Ap. p. 305). The reference was noticed but eventually the physical damages were stipulated (Ap, p. 308).

Our brief in the court below apprised libelant that we should desire to go into this matter of the deductions on the reference if they should become material.

Under the decision and decree of the District Court they were not material and the physical damages having been stipulated it would have been unjustifiable to take the time of the parties and of the Commissioner to go into them in mere anticipation that they might by some reversal or modification of the decree become material. If by any chance a mandate should come down from this court directing the lower court so to modify its decree as to make those considerations material, is the lower court to be estopped from ordering a reference to the Commissioner to assess the damages on the new basis as it previously ordered the reference to assess the damages on the basis of the original decree?

Incidentally we may remark that appellant's statements on pages 34 and 35 of the Reply Brief that we have suggested that by the use of overtime and double shifts there would be a total saving of \$173,000.00, which is said to be ridiculous, is utterly without warrant as reference to Appendix D of our original brief shows clearly that we were asking a deduction for the saving that would have been made by overtime or double shifts in the alternative, not both of them.

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#### **DEDUCTION ON ACCOUNT OF OWNER'S REPAIRS.**

Appellant denies the justice of this deduction, first of all, on the ground that no repairs were made for the owner except those directly necessitated by the collision, and that therefore there should be no apportionment of the period of repair.



The collision repairs and the so-called "engine" repairs were at opposite ends of the ship (Apostles, p. 265). The specifications for the collision repairs were drawn up and signed by all parties in the office of Mr. Frank, counsel for appellant (Apostles, p. 261). No items whatever on account of the overhauling or repair of the Bayard's engines were included in these specifications (Apostles, p. 261) nor in the judgment for the physical damages.

Appellant now claims that an overhauling of the engines was necessary on account of the collision and that the list of repairs set forth on page XIII of the Appendix to our brief in chief were all repairs made in connection with the overhauling of the engines. This is testimony in the brief by the appellant which does not appear in the record.

Mr. Siversen was appellant's witness. He testified:

"Q. They overhauled the engines on the Bayard while she was there, didn't they? A. Yes.

Q. And there was *some miscellaneous work* done for the owner's account, was there not?

A. Yes \* \* \* " (Apostles, p. 293).

"A. \* \* \* ; in connection with the new foundations under the auxiliary motors there was a considerable amount of labor used; *it was outside of anything that was done on the engine.*

Q. The auxiliary motors were entirely separate and apart, they had nothing to do with the main engines at all?

A. No, nothing to do with the main engines.

Q. That was a side job?

A. That was aside from the main engines, yes.

\* \* \* (p. 296)

Q. *Aside from the engines* was there any work done on the vessel for the owner's account?

A. *I spoke of the auxiliary engines.*

Q. *You said you put new foundations under those?*

A. *There was miscellaneous piping work and things of that nature; I don't remember exactly.*

Q. That is to say, work altogether apart from the work required on account of the collision; there is no question about that at all, is there?

A. Work that was charged to the owner's account" (Apostles, p. 294).

Appellant's suggestion that the dirt in the engines was only the disorder and dirt generated in the engine and the engine room after the overhauling of the engines is answered by the testimony of the surveyor, Mr. Evers:

"Q. Was any work done upon the Bayard other than that necessitated by the collision, other than that required on account of the collision?

A. They did a lot of work on the engines, of course.

Q. What work did they do on the engines?

A. *They gave them an overhauling.*

Q. *Was that overhauling required by the collision?*

A. *We recommended nothing, because of the collision, on the engines.*

Q. Did you see what the contents of the engines was as they were overhauled?

A. I saw a lot of it come out.

Q. What was the condition?

A. Very dirty, indeed—*needed overhauling for dirt.*

Q. *Needed overhauling for dirt?*

A. *Yes, an accumulation of dirt"* (Apostles, pp. 276-177).

This answers appellant's argument that all the repairs for owner's account were made because the

engine might have gone out of alignment on account of the collision—pure surmise in any event.

### **The Authorities.**

Appellant attempts to distinguish *The Sequoia*, 132 Fed. 625. This was the case in which the “Cleveland” was laid up for repairs on account of the collision with the “Sequoia”. The owner made other repairs not necessitated by the collision but of substantial character and of benefit to the owner, and Judge de Haven held that the period of detention must be apportioned.

Appellant attempts to distinguish this case on the ground that the owner’s repairs to the “Cleveland” had been commenced before the collision and says that the rule of this case is limited to cases where such facts appear.

Appellant seems not to have examined carefully the facts reported in this case. It will be observed on reading the report that three different classes of repairs were made, namely, repairs commenced prior to the collision, the collision repairs, and additional repairs for the owner’s account which had *not* been begun before the collision. We quote from the report of the case:

“It further appears that at the time of the collision certain necessary repairs to the boilers and machinery of the Cleveland were being made. These repairs were to have been completed *on May 31st*, but were not, because it was apparent that the steamer would necessarily be detained beyond that date on account of the damage caused by the collision. While this damage was being repaired, *the necessary repairs, which, but for the collision, would*

*have been completed on May 31st, were proceeded with, and, in addition to these, the owners of the Cleveland had other repairs made during the same time, which, while they may not have been then absolutely necessary to render her seaworthy, were yet of a substantial character, and of benefit to the steamer. The making of these latter repairs consumed about one week, but did not interfere with or delay the repairs made necessary by reason of the collision."*

The apportionment of the period of detention was made on account of the last class of repairs, as will be seen from the following:

*"It may be that these repairs would not have been made at that time except for the fact that the steamer was under detention because of the injury received by her in the collision with the Sequoia, but, nevertheless, the repairs made were substantial, and must have been made some time in the near future. To allow the owners of the Cleveland to recover the entire value of her use during the time they were being made would really place them in a better position than if the collision had not occurred. I am aware that this conclusion is opposed to the rule followed in the case of The Acanthus, 85 L. T. (N. S.) 696. I am not, however, satisfied with the reasoning upon which that decision is based. It seems to me more equitable to hold that upon the facts appearing here the libelants are only entitled to recover as damages one-half the value of the use of the Cleveland while she was undergoing repairs."*

The case, therefore, is exactly in point with ours, namely, repairs of substantial benefit to the owner, not necessitated by the collision, were begun and made



after the collision, simultaneously with the collision repairs.

*The Bratsberg*, 127 Fed. 105, and

*The John F. Gaynor*, 124 Fed. 743, 130 Fed. 856, cited in the Appendix to our major brief, page XV, are on the same principle as *The Sequoia*.

Appellant quotes passages from *The Marine Insurance Co. v. China Steamship Co.*, 6 Asp. 68; *Ruabon Steamship Co. v. London Assurance Co.*, 1900 A. C. 6, and *The Acanthus*, 9 Asp. 276, which show that the English rule requires that the owner's repairs not only be of substantial benefit to the owner but to be necessary. These requirements of the English rule were pointed out in our major brief, pages XV. to XIX. of the Appendix. We also pointed out, however, that Judge de Haven in *The Sequoia*, supra, expressly disapproved the rule of *The Acanthus* and held that the proper test was whether the repairs were substantial and of benefit to the vessel.

The rule for which we contended in our brief in chief is therefore sanctioned by the American authorities and is, we submit, correct on principle.



United States  
Circuit Court of Appeals

For the Ninth Circuit.

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CROSSETT-WESTERN LUMBER COMPANY, a  
Corporation,

Appellant,

vs.

SUDDEN & CHRISTENSON, Claimants of the  
Cargo of the American Steamship "Tam-  
pico",

Appellee.

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Apostles on Appeal.

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Upon Appeal from the Southern Division of the  
United States District Court for the  
Northern District of California,  
First Division.

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FILED

AUG 22 1922

F. D. MONCKTON,  
CLERK.





United States  
Circuit Court of Appeals  
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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Southern Division of the United States  
District Court, for the Northern District of  
California, First Division, In Admiralty.

No. 16030.

CROSSETT-WESTERN LUMBER CO.,  
Libelant,

vs.

THE CARGO OF THE AMERICAN STEAM-  
SHIP "TAMPICO,"

Respondent,

SUDDEN & CHRISTENSON,  
Cross-Libelant,

vs.

CROSSETT-WESTERN LUMBER CO.,  
Cross-Respondent.

**Amended Praecept for Apostles on Appeal.**

To the Clerk of the above-entitled Court:

Please prepare transcript of record on this cause  
and include therein:

1. The statement required by Paragraph 1 of  
Section 1 of Rule 4 of the Rules of Admiralty of  
the United States Circuit Court of Appeals for  
the *Northern* Circuit.

2. Notice of Appeal.

3. Assignment of errors.

4. Notice of filing bond on appeal.

5. Bond on appeal.

6. Amended answer.



7. Amended cross libel.
8. Decree of the above-entitled Court filed May 1, 1922.
9. Memorandum decision of the above-entitled Court. [1\*]
10. Stipulation and order concerning original exhibits.
11. Deposition of Arthur Bowles Cahill, taken August 1, 1921.
12. This praecipe.

PLATT & PLATT, MONTGOMERY &  
FALES,

Proctors for Libelant, Cross-Respondent and Appellant.

HUGH MONTGOMERY,  
Of Counsel.

[Endorsed]: Filed August 9, 1922. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.  
[2]

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\*Page-number appearing at foot of page of original certified Apostles on Appeal.

In the Southern Division of the United States  
District Court, for the Northern District of  
California, First Division.

No. 16030.

CROSSETT-WESTERN LUMBER CO., a Cor-  
poration,

Libelant,

vs.

THE CARGO OF THE AMERICAN STEAM-  
SHIP "TAMPICO,"

Respondent.

**Statement of Clerk, U. S. District Court.**

**PARTIES.**

Libelant and Cross-Respondent:

CROSSETT-WESTERN LUMBER COM-  
PANY, a Corporation.

Respondent:

THE CARGO OF THE AMERICAN  
STEAMSHIP "TAMPICO."

Claimant and Cross-Libelant:

SUDDEN & CHRISTENSON.

PROCTORS.

For Libelant and Cross-Respondent:

HUGH MONTGOMERY, Esq., PLATT &  
PLATT, MONTGOMERY & FALES,  
Portland, Oregon.

For Respondent, Claimant and Cross-Libelant:

IRA S. LILLICK, Esq., San Francisco, Calif.

## PROCEEDINGS.

1916.

May

17. Filed verified libel for charter hire. Issued monition for the attachment of the cargo of the American Steamship "Tampico," which was afterwards returned with the following return of the U. S. Marshal endorsed thereon:  
"In obedience to the within monition, I attached the cargo of the Am. Stmr. 'Tampico' therein described, on the 17th day of May, 1916 and have given due notice to all persons claiming the same that this Court will, on the 30th day of May, 1916 (if that day be a day of jurisdiction, if not on the next day of jurisdiction thereafter), proceed to trial and condemnation thereof, should no claim be interposed for the same. I further return that I posted a notice of seizure on the herein named cargo of the Am. Str. 'Tampico.' I hereby further return that I served a copy of this monition on E. J. Thomas, 2d Officer of the above-named Am. S. S. 'Tampico' at S. F.

Dated San Francisco, May 17th,  
1916.

J. B. HOLOHAN,  
United States Marshal,  
By Thos. F. Mulhall,  
Deputy."

Filed claim of Sudden & Christenson, a corporation, to said cargo.  
Filed bond for release of cargo in the sum of \$12,500.00.

October 25. Filed answer of respondent.  
Filed cross-libel by Sudden of Christensen.

1918

September 5. Filed answer to cross-libel.

December 19. Filed depositions of H. S. Mitchell and R. T. Platt, taken on behalf of libelant.

January 13. Filed depositions of Edwin A. Christensen, Arthur B. Cahill and F. M. Barry, taken on behalf of claimant and cross-libelant. [4]

1919.

November 18. This cause came on this day for hearing before the Honorable Frank H. Rudkin, Judge. After hearing, the Court ordered that the case be submitted on the record, and briefs to be filed.

December 17. Filed stipulation as to facts.

1920.

- January 13. The Court this day filed an opinion in which it was ordered that a decree be entered in favor of libelant.
- February 5. The Court this day filed an opinion disallowing the sum of \$1034.50 claimed by libelant.
- March 18. Filed decree.
- June 23. Filed notice of appeal.  
Filed supersedeas and cost bond on appeal.
- July 8. Filed assignment of errors.
- August 7. Filed apostles on appeal with Clerk, U. S. Circuit Court of appeals.

1921.

- April 9. Filed Mandate from U. S. Circuit Court of Appeals, Ninth Circuit, reversing the Decree of this Court, and remanding the cause to this Court, with instructions to ascertain and adjudge the amount, if any, to be awarded the cross-libelant.

September 26. Filed deposition of A. B. Cahill.

October 11. Cause submitted. [5]

1922.

- March 9. Filed opinion and order to enter a decree for cross-libelant for \$8799.96 with interest, etc.
18. Filed amendment to answer.  
Filed amendment to cross-libel.



- |      |                              |
|------|------------------------------|
| May  | 1. Filed final decree.       |
| July | 3. Filed notice of appeal.   |
|      | Filed assignment of errors.  |
|      | 8. Filed bond on appeal. [6] |
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In the Southern Division of the United States  
District Court, in and for the Northern Dis-  
trict of California.

First Division. In Admiralty.

CROSSETT WESTERN LUMBER COMPANY,  
Libelant,

vs.

THE CARGO OF THE AMERICAN STEAM-  
SHIP "TAMPICO,"

Respondent.

SUDDEN & CHRISTENSON,

Claimant and Cross-Libelant.

CROSSETT WESTERN LUMBER COMPANY,  
Cross-Libelees.

**(Deposition of Arthur Bowles Cahill.)**

BE IT REMEMBERED: That on Monday,  
August 1, 1921, pursuant to stipulation of counsel  
hereunto annexed, at the offices of Ira S. Lillick,  
Esq., in the Kohl Building, in the city and county  
of San Francisco, State of California, personally  
appeared before me, Francis Krull, a United States  
Commissioner for the Northern District of Cali-  
fornia, authorized to take acknowledgments of bail

and affidavits, etc., Arthur Bowles Cahill, a witness called on behalf of claimant and cross-libelant.

T. M. Levy, Esq., representing Ira S. Lillick, Esq., appeared as proctor for claimant and cross-libelant, and Hugh Montgomery, Esq., appeared as proctor for libelant and cross-libellee, and the said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

(It is hereby stipulated and agreed by and between the [7] proctors for the respective parties that the deposition of the above-named witness may be taken *de bene esse* on behalf of claimant and cross-libelant, at the offices of Ira S. Lillick, Esq., in the Kohl Building, in the city and county of San Francisco, State of California, on Monday, August 1, 1921, before Francis Krull, a United States Commissioner for the Northern District of California, and in shorthand by Charles R. Gagan.

(It is further stipulated that the deposition, when written up, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said deposition, and that all objections as to materiality and competence of the testimony are reserved to all parties.

(It is further stipulated that the reading over

(Deposition of Arthur Bowles Cahill.)  
of the testimony to the witness and the signing  
thereof are hereby expressly waived.) [8]

---

**Deposition of Arthur Bowles Cahill for Claimant.**

ARTHUR BOWLES CAHILL, called on behalf of claimant and cross-libelant, sworn.

Mr. LEVY.—Q. Where are you employed?

A. Sudden & Christenson.

Q. In what capacity? A. Secretary.

Q. Where were you employed from November, 1915 to February, 1916?

A. By Sudden & Christenson.

Q. In what capacity at that time? A. Secretary.

Q. What were your duties with Sudden & Christenson at that time?

A. The duties of a secretary, and keeping accounts of vessels.

Q. In the general course of your employment, were you familiar with the movements of vessels controlled by Sudden & Christenson? A. I was.

Q. And were you familiar with the details of handling those vessels? A. I was.

Q. And the accounts in regulation thereto?

A. Yes, sir.

Q. Do you know whether, on or about September 23, 1915, Sudden & Christenson, through their agents, Dearborn & Co., of New York, had sub-chartered the steamship "Eureka" to W. R. Grace & Co.?

A. Yes, sir.

(Deposition of Arthur Bowles Cahill.)

Q. They had? A. Yes, sir.

Q. And do you know that on or about October 18, 1915, Sudden & Christenson had chartered the steamship "Tampico" from the Crossett Western Lumber Company? A. Yes, sir.

Q. Where are those charter parties?

A. Just what charter-parties do you mean?

Q. The charter party under date October 18, 1915, on the "Tampico," between Sudden & Christenson and the Crossett Western Lumber Company; as a matter of fact, Mr. Cahill, that charter party has been introduced in evidence in this case, has it not? [9]

A. Yes, but I believe we should have the original charter-party on record in our office.

Mr. LEVY.—It is hereby stipulated and agreed that a copy of the charter-party under date October 18, 1915, between Crossett Western Lumber Company, as owners, and Sudden & Christenson as charterers, on the steamship "Tampico," appears on pages 10 to 14, both inclusive, in the Apostles on Appeal, filed in the United States Circuit Court of Appeals for the Ninth Circuit, Case No. 3533 therein.

And it is further stipulated and agreed that the nitrate charter-party between Sudden & Christenson's charterers, through their agents, D. B. Dearborn & Co., of New York, dated September 23, 1915, on the steamship "Eureka," is of record in evidence in the above-entitled matter as Christenson's



(Deposition of Arthur Bowles Cahill.)

Exhibit 1, the offer of which nitrate charter-party in evidence appears on page 114 of the said Apostles on Appeal.

Q. Mr. Cahill, are you familiar with the operations of those vessels during the time they were being handled by Sudden & Christenson?

A. Yes, sir.

Q. And with the relations of Sudden & Christenson with Crossett Western Lumber Company and W. R. Grace & Co. in regard thereto? A. Yes, sir.

Q. Prior to December 20, 1915, were Sudden & Christenson negotiating in any way with W. R. Grace & Co., with reference to the "Tampico"?

A. Yes, sir.

Q. What were those negotiations?

A. Those negotiations were for the freighting of the cargo of nitrate from the West Coast of South America to the East Coast of the United States.

Q. On what vessel?

A. That was on the steamer "Tampico."

Q. On or about December 20, 1915, did you send a letter to [10] Crossett Western Lumber Company for the purpose of ascertaining the redelivery date of the "Tampico" by the Crossett Western Lumber Company to her owners? A. Yes, sir.

Mr. LEVY.—It is hereby stipulated and agreed that the letter referred to by the witness in his answer to the last question appears on page 154 of the said apostles on appeal, and is numbered 6.



(Deposition of Arthur Bowles Cahill.)

Q. I hand you a copy of the said apostles on appeal and direct your attention to the letter just referred to, under date December 20, 1915, and ask you what was the obligation to the original nitrate charterers of the steamer "Eureka" that is referred to in that letter?

A. Sudden & Christenson entered into a contract to move a cargo of nitrate from the West Coast of South America to the East Coast of the United States.

Q. On what vessel was that, Mr. Cahill?

A. On the steamer "Eureka."

Q. And what happened with reference to that engagement between Sudden & Christenson and W. R. Grace & Co.?

A. Sudden & Christenson were obligated to move this cargo by the steamer "Eureka," and wanted to substitute the steamer "Tampico."

Q. Why couldn't they use the steamer "Eureka" to carry out that obligation to W. R. Grace & Co.?

A. Because, as I remember it, the steamer "Eureka" was on the Atlantic Coast, and the Panama Canal was closed.

Q. And what was the result of that situation?

A. The result was that we desired to fulfill our contract with the steamer "Tampico."

Q. Is it the fact, then, that because of the closing of the canal the "Eureka" was not available to carry out its engagement with W. R. Grace & Co.?

A. I think it is, yes, sir.

Q. Let me ask you what was the reason that the

(Deposition of Arthur Bowles Cahill.)

“Eureka” could not [11] be used to carry out her engagement with W. R. Grace & Co.?

A. Well, now, I will tell you, gentlemen, this is some time ago, and the details of all this thing are not quite clear to me.

Q. You have testified, Mr. Cahill, that the “Eureka” was on the Atlantic Coast, that the Canal was closed, and that the engagement that Sudden & Christenson had with the “Eureka” was to carry a cargo of nitrate from the West Coast of South America to the East Coast of the United States.

A. Yes, sir.

Q. Is it or is it not the fact, then, that because of this situation the “Eureka” could not be used to carry the cargo as agreed upon? A. Yes, sir.

Q. On or about December 27, 1915, did you receive a communication from the Crossett Western Lumber Company advising you that the terms of the charter-party between Crossett Western Lumber Company and the owners of the “Tampico” were the same as the terms of the charter-party on the “Eureka,” except that the delivery date was June 15, 1916 on the “Tampico”? A. Yes, sir.

Mr. LEVY.—It is hereby stipulated and agreed that the letter referred to in the last question and answer, and dated December 27, 1915, from Crossett Western Lumber Company to Sudden & Christenson appears on pages 154–55 of the said apostles on appeal, and is number 7.

Q. What, if anything, did you do, Mr. Cahill, with reference to closing your option on the “Tam-

(Deposition of Arthur Bowles Cahill.)

pico" for a second voyage, after receipt of this letter of December 27, 1915?

A. We notified the Crossett Western Lumber Company that we would avail ourselves of that option.

Q. I hand you the said apostles on appeal, and call your attention to a letter dated December 31, 1915, to Crossett Western Lumber Company, from Sudden & Christenson, and appearing on pages 156-7 [12] of the said apostles on appeal, and ask you if that is the notification that was sent by Sudden & Christenson to the Crossett Western Lumber Company, notifying the last-named company that you exercised your option for a second voyage of the "Tampico"?      A. Yes, sir.

Mr. LEVY.—It is hereby stipulated and agreed that the letter from Sudden & Christenson to Crossett Western Lumber Company, notifying the last-named company of the exercise of the option by Sudden & Christenson for a second voyage of the "Tampico" appears on pages 156-57 of the said apostles on appeal, and is numbered 8.

Q. Did you or did you not receive an answer to that notification of the exercise of your option?

A. Yes, I believe we did.

Q. I hand you the said apostles on appeal and call your attention to a letter dated January 3, 1916, from Crossett Western Lumber Company to Sudden & Christenson, and appearing on page 157 of the said apostles on appeal, and ask you if that is the letter that you received from Crossett Western

(Deposition of Arthur Bowles Cahill.)

Lumber Company in answer to your letter notifying Crossett Western Lumber Company of the exercise of your option on the "Tampico" for a second voyage? A. Yes, it is.

Mr. LEVY.—It is stipulated and agreed that the letter last referred to by the witness appears on page 157 of the said apostles on appeal, and is numbered 9.

Q. Mr. Cahill, what, if anything, did you do, and when, after the receipt of the letter dated January 3, 1916, that you have referred to, with reference to engaging the "Tampico" to W. R. Grace & Co?

A. We immediately, I think possibly the following day, made a contract with W. R. Grace & Co. to move a [13] cargo of nitrate from the West Coast of South America to the East Coast of the United States via the "Tampico."

Q. What form did that agreement take?

A. That was confirmed by a letter from our agents in New York, Messrs. D. B. Dearborn & Co., to W. R. Grace & Co.

Q. Who are D. B. Dearborn & Company, of New York?

A. D. B. Dearborn & Co. of New York were our New York agents.

Q. For what purpose?

A. For chartering for our account, for the handling of our vessels on the Atlantic Coast.

Q. Had they customarily acted for you in that capacity prior to this time? A. Yes, sir.

Q. For how long?



(Deposition of Arthur Bowles Cahill.)

A. I would say since about 1912.

Q. In the course of their duties as your agents, did they customarily contract for vessels in their own name?     A. Yes, sir.

Q. And for your account?     A. Yes, sir.

Q. Between whom were the negotiations that you have testified to between Sudden & Christenson and W. R. Grace & Co. for the "Tampico" conducted?

A. They were conducted by G. B. Dearborn.

Q. With what office of W. R. Grace & Co.?

A. The New York office of W. R. Grace & Co.

Mr. LEVY.—It is hereby stipulated and agreed that the following letter was sent by D. B. Dearborn & Co. of New York as the New York agents of Sudden & Christenson, to W. R. Grace & Co. covering a freight engagement on the "Tampico":

"January 4, 1916.

"Messrs. W. R. Grace & Co.,  
New York City.

Attention Mr. Fischer:

"Dear Sirs:

"Yours of the 3d received.

" 'Tampico': We confirm your statement that this steamer is substituted for the 'Eureka' and if the Canal is closed [14] when she is ready to sail from nitrate port she is to proceed to San Francisco with \$1 per ton less freight than via the Canal, say \$8 per ton.

Very truly yours."



(Deposition of Arthur Bowles Cahill.)

Q. Do you know whether or not that letter was ever received by W. R. Grace & Co.?

A. Why, it must have been, yes.

Q. Why do you say it must have been?

A. Because the steamer went on that voyage.

Q. So that pursuant to the agreement contained in that letter, the "Tampico" proceeded on a voyage in lieu of the "Eureka"?     A. Yes, sir.

Q. What, if anything, was attached to that letter that was sent to W. R. Grace & Co. under date January 4, 1916?

A. I think a copy of the charter-party of the "Eureka."

Mr. LEVY.—It is hereby stipulated and agreed that a copy of the said letter under date of January 4, 1916, to W. R. Grace & Co., of New York and from D. B. Dearborn & Co. of New York, the New York agents of Sudden & Christenson, together with a copy of the nitrate charter-party dated September 23, 1915, of the steamer "Eureka," between W. R. Grace & Co. and D. B. Dearborn & Co., as the New York agents of Sudden & Christenson, is of record in the above-entitled matter, and that the offer of said documents in evidence appears on page 114 of the said apostles on appeal.

Q. What did you proceed to do pursuant to the contract that you have testified to with W. R. Grace & Co., with reference to the "Tampico"?

A. We dispatched the steamer "Tampico" on this voyage for a cargo of nitrate, from the West Coast

(Deposition of Arthur Bowles Cahill.)

of South America to the East Coast of North America.

Q. Upon what contingencies, if any, did the carriage of this cargo for W. R. Grace & Co., either to the Atlantic Coast of the United [15] States or the Pacific Coast of the United States depend?

A. It depended upon whether or not the Panama Canal was closed at the time the steamer sailed from her nitrate port.

Q. If the Panama Canal was open at the time the "Tampico" left her nitrate port, what was the agreed freight rate?

A. The agreed freight rate was \$9 per ton.

Q. To where?

A. To the East Coast of the United States.

Q. And if the canal was closed at the time the vessel left her nitrate port, what was the agreed-upon freight rate, and to where?

A. The freight rate was \$8 per ton, to the West Coast of the United States.

Q. What would you say, therefore, composed the contract on the "Tampico" with W. R. Grace & Co.?

Mr. MONTGOMERY.—I would like the record to show an objection to the question upon the ground that the contract is in writing, has already been introduced in evidence, and is self-explanatory.

A. The charter-party.

Mr. LEVY.—Q. What charter-party?

A. The letter that D. B. Dearborn & Co. wrote for our account to Messrs. W. R. Grace & Co., together with the charter-party of the "Eureka."

(Deposition of Arthur Bowles Cahill.)

Q. When were this letter and the charter-party on the "Eureka" sent to W. R. Grace & Co. by D. B. Dearborn & Co. as your agents?

A. On January 4.

Q. What year?      A. 1916.

Q. When did you first receive notice from the Crossett Western Lumber Company that the owners of the "Tampico" required redelivery of the vessel by May 15, 1916, instead of June 15, 1916?

A. Along about January 11, 1916.

Q. I hand you a copy of a telegram under date of January 11, [16] 1916, from H. S. Mitchell to Sudden & Christenson, appearing on page 162 of the said apostles on appeal, and ask you if that is the first notification that you received that the owners of the "Tampico" required redelivery of the vessel prior to May 15, 1916?      A. Yes.

Mr. LEVY.—It is hereby stipulated and agreed that the telegram referred to in the last answer and question appears on page 162 of the said apostles on appeal, and is numbered 15.

Q. When did the second voyage of the "Tampico" commence?

A. I believe sometime in February, 1916.

Q. To refresh your recollection, was it February 22, 1916?      A. I think it was, yes.

Q. What was that second voyage?

A. That second voyage was a voyage to the East Coast of South America for a return to the East Coast of the United States with a cargo of nitrate.

Q. For whom?

(Deposition of Arthur Bowles Cahill.)

A. For Messrs. W. R. Grace & Co.

Q. And is that the voyage that was undertaken pursuant to the letter of January 4, 1916, to which was attached a copy of the nitrate charter on the "Eureka"?     A. Yes.

Q. I hand you the said apostles on appeal, and call your attention to a statement of account, or of loss and damage, covering the loss and damage claimed by Sudden & Christenson on account of the alleged action upon the part of Crossett Western Lumber Company in directing the "Tampico" to return to San Francisco for redelivery on or about May 15, 1916, instead of proceeding on her voyage for W. R. Grace and Co. to the East Coast of the United States for redelivery on or about June 15, 1916, which statement of account and statement of loss or damage appears on pages 127, 128 and 129 of the said apostles on appeal, and I [17] ask you if that statement is in each and every particular correct, and is a statement of the loss and damage by Sudden & Christenson on that account?

A. Yes, it is.

Q. Is that statement made up in the usual and customary method in the course of your business, and of the business of firms in a similar line of business?     A. Yes, sir.

Q. Was there an additional amount with reference to which you suffered loss or damage on account of the vessel being off hire during the charter term?

A. Yes.

Q. What is that amount?     A. \$2477.27.



(Deposition of Arthur Bowles Cahill.)

Q. So that the total damage suffered by you is the balance due shown in the statement which you have referred to, of \$14,871.57, plus the amount that you have just stated, \$2477.27?     A. Yes.

Cross-examination.

Mr. MONTGOMERY.—Q. If I understood you correctly, Mr. Cahill, the negotiations for the substitution of the “Tampico” were begun about December 20, 1915: Is that correct?

A. I think about that time, yes.

Q. And finally closed on January 4, 1916?

A. Yes.

Q. By letter?     A. Yes.

Q. Do you know the nature of the negotiations which were carried on between those respective dates?

A. They were carried on between our agents, Messrs. D. B. Dearborn & Co. and Messrs. W. R. Grace & Co. in New York; there might be some telegrams in connection with it.

Q. But you have no personal knowledge of those?

A. I cannot remember just now.

Q. But these negotiations, whatever they were, were with reference to the substitution of the “Tampico” under the original charter which you had with W. R. Grace & Co. on the steamship [18] “Eureka”: Is that correct?     A. Yes.

Q. Do you know whether or not that original charter on the steamship “Eureka” was ever released by W. R. Grace & Co. on account of the detention



(Deposition of Arthur Bowles Cahill.)

of the "Eureka" at the Atlantic end of the Canal?

A. I believe it is released automatically by that letter of January 4. [19]

United States of America,

State and Northern District of California,

City and County of San Francisco,—ss.

I certify that, in pursuance of stipulation of counsel on Monday, August 1, 1921, before me, Francis Krull, a United States Commissioner for the Northern District of California, at San Francisco, at the office of Ira S. Lillick, Esq., in the Kohl Building, in the city and county of San Francisco, state of California, personally appeared Arthur Bowles Cahill, a witness called on behalf of claimant and cross-libelant in the cause entitled in the caption hereof; and T. M. Levy, Esq., representing Ira S. Lillick, Esq., appeared as proctor for claimant and cross-libelant, and Hugh Montgomery, Esq., appeared as proctor for libelant and cross-libellee, and the said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the said cause, deposed and said as appears by his deposition hereto annexed.

I further certify that the deposition was then and there taken down in shorthand notes by Charles R. Gagan, and thereafter reduced to typewriting; and I further certify that by stipulation of the proctors for the respective parties, the reading over of the deposition to the witness and the signing thereof were expressly waived.

And I do further certify that I have retained the said deposition in my possession for the purpose of delivering the same with my own hands to the Clerk of the United States District Court for the Northern District of California, the court for which the same was taken.

And I do further certify that I am not of counsel, nor [20] attorney for either of the parties in said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

IN WITNESS WHEREOF, I have hereunto set my hand in my office aforesaid this 5th day of Aug., 1921.

FRANCIS KRULL, (Seal)

United States Commissioner, Northern District of California, at San Francisco.

[Endorsed]: Filed Sep. 26, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [21]

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In the Southern Division of the United States District Court, for the Northern District of California, First Division. In Admiralty.

No. 16030.

CROSSETT WESTERN LUMBER CO.,

Libelant,

vs.

THE CARGO OF THE AMERICAN STEAMSHIP "TAMPICO,"

Respondent,

SUDDEN & CHRISTENSON,

Cross-Libelant,

vs.

CROSSETT WESTERN LUMBER CO.,

Cross-Respondent.

**(Opinion and Order to Enter Decree in Favor of  
Cross-libelant for \$8799.96, etc.)**

GOLDEN W. BELL, ANDROS & HENGSTLER  
and PLATT & PLATT, MONTGOMERY &  
FALES, proctors for libelant & cross-respond-  
ent.

IRA S. LILLICK, Esq., proctor for claimant and  
cross-libelant.

The Circuit Court of Appeals having remanded  
this cause with directions to this Court to find cer-  
tain facts and enter a decree accordingly, the Court  
now finds:

The obligation of cross-libelants to Grace & Co.  
to transport nitrate to the Atlantic Coast on the  
“Tampico,” if the Canal were open at the time that  
the “Tampico” was ready to sail from the Nitrate  
Port became fixed on January 4th, 1916. The  
Canal was open on the day the “Tampico” was  
ready to sail. The amount [22] that should be  
awarded to libelant for charter hire under the  
libel and answer, is the sum of \$6,015.61, being  
\$8,492.88 the stipulated amount, less the sum of  
\$2,477.27 due respondent on account of off-hire, con-  
ceded by libelant in their supplemental brief.

The amount that should be awarded to cross-libel-

ant as damages under the issues made by the cross-libel and answer thereto is the sum of \$14,851.57.

A decree will therefore be entered for cross-libelant for the difference, being \$8,799.96, with interest from May 19th, 1916, at 7 per cent per annum and costs.

Respondent may amend its answer to the libel to set up its claim for off-hire.

March 9th, 1922.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Mar. 9, 1922. W. B. Maling,  
Clerk. By Lyle S. Morris, Deputy Clerk. [23]

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In the Southern Division of the United States District Court, for the Northern District of California, First Division. In Admiralty.

No. 16030.

CROSSETT-WESTERN LUMBER CO.,  
Libelant,

vs.

THE CARGO OF THE AMERICAN STEAMSHIP "TAMPICO,"

Respondent.

SUDDEN & CHRISTENSON,  
Cross-libelant,

vs.

CROSSETT-WESTERN LUMBER CO.,  
Cross-respondent.

**Amendment to Answer to Libel.**

Pursuant to the permission and direction of the above-entitled court, heretofore given and made, claimant and cross-libelant herein hereby amends its answer to the libel on file herein, by adding thereto, after Article V thereof, the following, to be designated as Article VI:

**“VI.**

“That for further and separate defense to the libel of libelant on file herein, claimant alleges the fact to be that said steamship “Tampico” was off-hire from 12:45 P. M. April 3d, 1916 to 3:40 P. M. April 11th, 1916, totaling seven days, 14 hours and 55 minutes. That, pursuant to the terms of said charter-party between [24] Crossett Western Lumber Co. and Sudden & Christenson, claimant is entitled to a deduction in the charter hire of said steamship “Tampico” during the time that she was so off-hire, at the rate of \$325 per day, amounting to the sum of \$2,477.27.”

SUDDEN & CHRISTENSON,

By A. B. Cahill,

Secy.

IRA S. LILLICK,

Proctor for Claimant. [25]

State of California,

City and County of San Francisco,—ss.

A. B. Cahill, being first duly sworn, deposes and says: That he is an officer, to wit: the secretary, of



Sudden & Christenson, a corporation, claimant in the foregoing action, and, as such, is duly authorized to make this verification on behalf of said claimant; that he has read the foregoing amendment to the answer to the libel herein, knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on information or belief, and that, as to those matters, he believes it to be true.

A. B. CAHILL.

Subscribed and sworn to before me this 30th day of March, A. D. 1922.

[Seal]

M. V. COLLINS,

Notary Public, in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Due service and receipt of a copy of the within amendment to answer to libel is hereby admitted this 4th day of April, 1922.

PLATT & PLATT,

MONTGOMERY & FALES,

Proctors for Crossett-Western Lumber Co.

Filed Apr. 18, 1922. W. B. Maling, Clerk. By  
C. W. Calbreath, Deputy Clerk. [26]

In the Southern Division of the United States District Court, for the Northern District of California, First Division. In Admiralty.

No. 16030.

CROSSETT-WESTERN LUMBER CO.,  
Libelant,

vs.

THE CARGO OF THE AMERICAN STEAMSHIP "TAMPICO,"

Respondent.

SUDDEN & CHRISTENSON,  
Cross-libelant,

vs.

CROSSETT-WESTERN LUMBER CO.,  
Cross-respondent.

**Amendment to Cross-libel.**

Pursuant to the permission and direction of the above-entitled Court, heretofore given and made, claimant and cross-libelant herein hereby amends its cross-libel, on file herein, by adding thereto, after Article VIII thereof, the following, to be designated as Article VIII-a:

**VIII-a.**

"That by way of a further cause of cross-libel against Crossett-Western Lumber Co., a corporation, libelant and cross-respondent above named, claimant and cross-libelant alleges the fact to be that said steamship "Tampico"

was off-hire from 12:45 P. M. April 3, 1916 to 3:40 P. M. April 11, 1916, totaling 7 days, 14 hours and 55 [27] minutes. That, pursuant to the terms of said charter-party between Crossett Western Lumber Co. and Sudden & Christenson, claimant is entitled to a deduction in the charter hire of said steamship "Tampico" during the time that she was so off-hire, at the rate of \$325 per day, amounting to the sum of \$2,477.27."

SUDDEN & CHRISTENSON,

By A. B. Cahill,

Secy.

IRA S. LILLICK,

Proctor for Claimant. [28]

State of California,

City and County of San Francisco,—ss.

A. B. Cahill, being first duly sworn, deposes and says: That he is an officer, to wit; the Secretary, of Sudden & Christenson, a corporation, claimant in the foregoing action, and, as such, is duly authorized to make this verification on behalf of said claimant; that he has read the foregoing amendment to cross-libel herein, knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on information or belief, and that, as to those matters, he believes it to be true.

A. B. CAHILL.

Subscribed and sworn to before me this 30th day of March, A. D. 1922.

[Seal]

M. V. COLLINS,

Notary Public,

in and for the City and County of San Francisco,  
State of California.

[Endorsed]: Due service and receipt of a copy of the within amendment to cross-libel is hereby admitted this 4th day of April, 1922.

PLATT & PLATT,

MONTGOMERY & FALES,

Proctors for Crossett Western Lumber Co.

Filed Apr. 18, 1922. W. B. Maling, Clerk. By  
C. W. Calbreath, Deputy Clerk. [29]

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In the Southern Division of the United States  
District Court, for the Northern District of  
California First Division. In Admiralty.

No. 16030.

CROSSETT-WESTERN LUMBER CO.,

Libelant,

vs.

THE CARGO OF THE AMERICAN STEAM-  
SHIP "TAMPICO,"

Respondent.

SUDDEN & CHRISTENSON,

Cross-Libelant,

vs.

CROSSETT-WESTERN LUMBER CO.,

Cross-Respondent.

**Final Decree.**

This cause having been remanded to the above-entitled Court by the United States Circuit Court of Appeals for the Ninth Circuit, with directions to this Court to find certain facts and enter a decree accordingly, and the Court, in accordance with said directions, having heretofore entered herein its findings as to said fact,

IT IS NOW ORDERED, ADJUDGED AND DECREED by the above-entitled court that Sudden & Christenson, cross-libelant herein, be awarded the sum of \$8,799.96 with interest thereon at the rate of 7 per cent per annum from May 19, 1916, amounting to \$3,666.89, together with costs to be taxed; and that, in default thereof, execution issue against Crossett-Western Lumber Co., and the stipulators on any bond filed by said Crossett-Western Lumber Co., herein.

Signed this 1st day of May, 1922.

M. T. DOOLING,

Judge.

[30]

[Endorsed]: Filed May 1, 1922. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.



Entered in Vol. 12 Judg. and Decrees, at page 317.  
[31]

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In the Southern Division of the United States  
District Court, for the Northern District of  
California First Division. In Admiralty.

No. 16030.

CROSSETT-WESTERN LUMBER CO.,  
Libelant,

vs.

THE CARGO OF THE AMERICAN STEAM-  
SHIP "TAMPICO,"

Respondent.

SUDDEN & CHRISTENSON,  
Cross-Libelant,

vs.

CROSSETT-WESTERN LUMBER CO.,  
Cross-Respondent.

**Notice of Appeal.**

To the cargo of the American Steamship  
"Tampico," respondent, and Sudden & Christ-  
enson, Cross-Libelant, and to Ira S. Lillick,  
Esq., proctor for respondent and cross-appel-  
lant, and to the Clerk of the above-entitled  
court:

Please take notice that the libelant and cross-  
respondent above named hereby appeals from the  
final decree made and executed herein on the 1st  
day of May, 1922, to the United States Circuit

Court of Appeals for the Ninth Circuit, to be holden in and for said Circuit at the City of San Francisco, in the State of California.

Dated at San Francisco, June 27th, 1922.

PLATT & PLATT,  
MONTGOMERY & FALES,

Proctors for Libellant, Cross-Respondent and Appellant.

HUGH MONTGOMERY of Counsel. [32]

Service of the within notice of appeal, by delivery of a copy to the undersigned, is hereby admitted this —— day of June, 1922.

IRA S. LILLICK,

Proctor for Respondent, Cross-Libellant and Appellee.

Filed Jul. 3, 1922. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [33]

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In the Southern Division of the United States District Court, for the Northern District of California First Division. In Admiralty.

No. 16030.

CROSSETT-WESTERN LUMBER CO.,  
Libellant,

vs.

THE CARGO OF THE AMERICAN STEAMSHIP "TAMPICO,"

Respondent.

SUDDEN & CHRISTENSON,

Cross-Libellant,

vs.

CROSSETT-WESTERN LUMBER CO.,

Cross-Respondent.

**Assignments of Error.**

The libellant hereby assigns error in the rulings and proceedings of the District Court herein, as follows:

I.

The Court erred in entering a final decree herein, awarding to the cross-libellant the sum of \$8,799.96, principal, and \$3,666.89, interest, for the reason that the items of damage claimed by the cross-libellant were not, under the decision of the Circuit Court of Appeals for the Ninth Circuit, proper items of damage. [34]

II.

The Court erred in refusing to hold from the undisputed record in this case that the cross-libellant had subchartered the vessel in violation of the charter-party between the parties without obtaining the consent of the libellant.

III.

The Court erred in not entering a decree in favor of the libellant and dismissing the cross-libellant, on the ground that the cross-libellant had violated its contract by subchartering the steamship "Tampico" without the consent of the libellant, and for the further reason that the cross-

libelant failed to present to the court any competent or proper evidence in support of its claim for damages, and that the items of damage presented were not proper items of damage.

Dated at San Francisco this 27th day of June, 1922.

PLATT & PLATT,  
MONTGOMERY & FALES,

Proctors for Libelant, Cross-Respondent and  
Appellant.

HUGH MONTGOMERY, of Counsel.

Service of the within assignments of error, by delivery of a copy to the undersigned, is hereby acknowledged this —— day of June, 1922.

IRA S. LILLICK,

Proctor for Respondent, Cross-Libelant and  
Appellee.

[Endorsed]: Filed Jul. 3, 1922. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [35]

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In the Southern Division of the United States  
District Court, for the Northern District of  
California First Division. In Admiralty.

No. 16030.

CROSSETT-WESTERN LUMBER CO.,

Libelant,

vs.

THE CARGO OF THE AMERICAN STEAM-  
SHIP "TAMPICO,"

Respondent.

SUDDEN & CHRISTENSON,

Cross-Libelant,

vs.

CROSSETT-WESTERN LUMBER CO.,

Cross-Respondent.

**Notice of Filing of Bond on Appeal.**

To IRA S. LILLICK, Esq., Proctor for Respondent  
and Cross-Libelant above named:

You will please take notice that the bond on appeal herein has been this day filed in the office of the Clerk of the District Court of the United States for the Northern District of California, Southern Division, and executed and given by the above-named libelant, and by National Surety Company, a corporation authorized under the laws of California to do business within said state and within the territory in which the above-entitled court has jurisdiction.

July 8th, 1922.

PLATT & PLATT,

MONTGOMERY & FALES,

Proctors for Libelant.

HUGH MONTGOMERY, of Counsel. [36]



Service of the within notice of filing of bond on appeal, by delivery of a copy to the undersigned, is hereby acknowledged this 8th day of July, 1922.

IRA S. LILLICK,

Proctors for Respondent, Cross-Libelant and Appellee.

[Endorsed]: Filed Jul. 8, 1922. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [37]

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In the Southern Division of the United States District Court, for the Northern District of California First Division. In Admiralty.

No. 16030.

CROSSETT-WESTERN LUMBER CO.,

Libelant,

vs.

THE CARGO OF THE AMERICAN STEAMSHIP "TAMPICO,"

Respondent.

SUDDEN & CHRISTENSON,

Cross-Libelant,

vs.

CROSSETT-WESTERN LUMBER CO.,

Cross-Respondent.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS,  
That we, Crossett-Western Lumber Company, as

principal, and National Surety Company, a corporation as surety, are held and firmly bound unto Sudden & Christenson a copartnership, in the full and just sum of \$15,000.00, to be paid to the said Sudden & Christenson, a copartnership, or their executors, to which payment well and truly to be made we bind ourselves, our successors, executors, administrators and assigns, jointly and severally, by these presents.

Sealed with our seals this 5th day of July, A. D., 1922.

Whereas, in the District Court of the United States for the Northern District of California, Southern Division, in a suit pending in said court between Crossett-Western Lumber Company, libelant, and Sudden & Christenson, Cross-libelant, a final decree was rendered on the 1st day of May, 1922, awarding to said Sudden & Christenson the sum of \$12,466.85, together with their costs and disbursements, and said Crossett-Western Lumber Company having petitioned for an appeal from said decree and [38] filed a copy thereof in the clerk's office of said court, to reverse and modify the same, in the aforesaid case, and a citation directed to the said Messrs. Sudden & Christenson, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, to be holden in the city of San Francisco on the first Monday in October, 1922, having been served on said Messrs. Sudden & Christenson:

NOW, the condition of this obligation is such that if the said Crossett-Western Lumber Company will prosecute its appeal to effect and answer all damages and costs if it fail to make its plea good, then the said obligation to be void; else to remain in full force and effect; said bond to act as a supersedeas.

CROSSETT-WESTERN LUMBER COMPANY.

By PLATT & PLATT,  
MONTGOMERY & FALES.

By HUGH MONTGOMERY,

[Seal] Its Proctors of Record.

NATIONAL SURETY COMPANY.

By F. J. CRISP,  
Resident Vice-president.

By A. C. ROBESON,  
Resident Assistant Secretary.

[Endorsed]: Filed Jul. 8, 1922. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [39]

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In the Southern Division of the United States  
District Court, for the Northern District of  
California First Division. In Admiralty.

No. 16030.

CROSSETT-WESTERN LUMBER CO.,

Libelant,

vs.

THE CARGO OF THE AMERICAN STEAM-  
SHIP "TAMPICO"

Respondent.

SUDDEN &amp; CHRISTENSON,

Cross-Libelant,

vs.

CROSSETT-WESTERN LUMBER CO.,

Cross-Respondent.

**Stipulation and Order Concerning Original Exhibits.**

It is hereby stipulated and agreed between the proctors for the respective parties hereto that all the exhibits introduced in evidence at the hearing of the above-entitled cause before the above Court, may be omitted from the apostles on appeal in said cause, and may be filed in the United States Circuit Court of Appeals of the Ninth Circuit in the original form in which the same are respectively introduced before the said Court on the trial of the cause.

Dated: August 3, 1922.

PLATT &amp; PLATT,

MONTGOMERY &amp; FALES,

Proctors for Appellant.

IRA S. LILLICK,

Proctors for Appellee.

It is so Ordered:

FRANK H. RUDKIN,

District Judge.

[Endorsed]: Filed Aug. 7, 1922. W. B. Maling,  
Clerk. By C. M. Taylor, Deputy Clerk. [40]

**Certificate of Clerk U. S. District Court to Apostles  
on Appeal.**

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 40 pages, numbered from 1 to 40, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of Crossett-Western Lumber Co., libelant, vs. the Cargo of the American Steamship "Tampico," respondent, No. 16030, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for apostles on appeal (copy of which is embodied herein), and the instructions of the proctors for libelant and appellant herein.

I further certify that the cost for preparing and certifying the foregoing apostles on appeal is the sum of Twelve Dollars and Twenty-five cents (\$12.25) and that the same has been paid to me by the proctor for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 10th day of August, A. D., 1922.

[Seal]

WALTER B. MALING,  
Clerk.

By C. M. Taylor,  
Deputy Clerk. [41]



[Endorsed]: No. 3910. United States Circuit Court of Appeals for the Ninth Circuit. Crossett-Western Lumber Company, a Corporation, Appellant vs. Sudden & Christenson, Claimants of the Cargo of the American Steamship "Tampico," Appellee. Apostles on Appeal: Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed August 10, 1922.

F. D. MONCKTON,

Clerk of the United States Circuit Court of  
Appeals for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

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In the United States Circuit Court of Appeals for  
the *Northern* Circuit.

CROSSETT-WESTERN LUMBER CO.,  
Appellant,

vs.

SUDDEN & CHRISTENSON, Owners and Claim-  
ants of the American Steamship "TAM-  
PICO,"

Appellees.

**Stipulation and Order Under Subdivision 1 of  
Rule 16 Enlarging Time to and Including Sep-  
tember 1, 1922, to File Record and Docket  
Cause.**

It is hereby stipulated and agreed that the ap-  
pellant above named may have thirty days from the  
1st day of August, 1922, within which to file in the  
above-entitled court the apostles and record on  
appeal in the above-entitled matter.

PLATT & PLATT, MONTGOMERY &  
FALES,

Proctors for Appellant.

IRA S. LILLICK,

Proctor for Appellee.

It is so ordered.

W. H. HUNT,

U. S. Circuit Judge.

[Endorsed]: No. 3910. In the United States Cir-  
cuit Court of Appeals for the Northern Circuit.  
Crossett-Western Lumber Co., Appellant, vs. Sud-  
den & Christenson, Owners and Claimants of the  
American Steamship "Tampico," Appellees. Stipu-  
lation and Order Under Subdivision 1 of Rule 16  
Enlarging Time to and Including Sept. 1, 1922, to  
File Record and Docket Cause. Filed Aug. 9, 1922.  
F. D. Monckton, Clerk. Refiled Aug. 10, 1922. F.  
D. Monckton, Clerk.

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

No. —.

**CROSSETT-WESTERN LUMBER CO.,**

Appellant,

vs.

**SUDDEN & CHRISTENSON, Owners and Claim-**  
**ants of the American Steamship "TAM-**  
**PICO,"**

Appellees.

**Stipulation and Order Re Use of Apostles on Ap-**  
**peal in Circuit Court of Appeals — Case No.**  
**3533.**

It is stipulated and agreed, by and between the parties in the above-entitled case, acting through their respective proctors of record, that the apostles on appeal in the above-entitled case may be made up of the record filed in the former appeal in the above case, being Case #3533 in the Circuit Court of Appeals for the Ninth Circuit, and that it will be unnecessary for the appellant to reprint such portion of the record as is included in the apostles on appeal on the former appeal, and that the record, to be printed on this appeal, may be made up out of the documents filed in connection with this appeal, and such evidence as was taken following the

reversal of this case by the Circuit Court of Appeals for the Ninth Circuit.

PLATT & PLATT, MONTGOMERY &  
FALES,

Proctors for Appellant.

IRA S. LILLICK,

Proctor for Appellee.

It is so ordered.

W. H. HUNT,

U. S. Circuit Judge.

[Endorsed]: No. 3910. In the United States Circuit Court of Appeals for the Ninth Circuit. Crossett-Western Lumber Co., Appellant, vs. Sudden & Christenson, Owners and Claimants of the American Steamship "Tampico," Appellees. Stipulation and Order Re Use of Apostles on Appeal in C. C. A. Case No. 3533. Filed Aug. 12, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

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In the United States Circuit Court of Appeals for  
the Ninth Circuit.

No. —.

CROSSETT-WESTERN LUMBER CO.,

Appellant,

vs.

SUDDEN & CHRISTENSON, Owners and Claim-  
ants of the American Steamship "TAM-  
PICO,"

Appellees.

**Stipulation and Order Re Substitution of Executors  
of Estate of Ed. Christenson.**

It is stipulated and agreed, by and between the parties in the above-entitled case, acting through their respective attorneys of record, that either party may, after the perfection of this appeal, move the Court for a substitution on the record of the executors of the estate of Ed. Christenson, deceased, and no objection will be made by either party to such substitution, and such substitution may be made after the perfection of the appeal, and both parties waive any objection to such questions in connection with said appeal.

PLATT & PLATT, MONTGOMERY &  
FALES,

Proctors for Appellant.

IRA S. LILLICK,

Proctor for Appellee.

It is so ordered.

WM. H. HUNT,

U. S. Circuit Judge.

[Endorsed]: No. 3910. In the United States Circuit Court of Appeals for the Ninth Circuit. Crossett-Western Lumber Co., Appellant, vs. Sudden & Christenson, Owners and Claimants of the American Steamship "Tampico," Appellees. Stipulation and Order Re Substitution of Executors of Estate of Ed. Christenson. Filed Aug. 12, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.



No. 3910

# United States Circuit Court of Appeals for the Ninth Circuit

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CROSSETT WESTERN LUMBER  
COMPANY, a Corporation,  
Appellant,

vs.

SUDDEN & CHRISTENSON, Claim-  
ants of the Cargo of the American  
Steamship "TAMPICO",  
Appellee.

No. 3910

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## BRIEF FOR APPELLANT

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*Upon Appeal From the Southern Division of the United  
States District Court for the Northern District  
of California First Division.*

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PLATT & PLATT, MONTGOMERY & FALES,  
Proctors for Appellant.

IRA S. LILLICK, Esq.,  
Proctor for Appellee.

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FILED

OCT 11 1922

E. D. MONTGOMERY



# United States Circuit Court of Appeals for the Ninth Circuit

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CROSSETT WESTERN LUMBER  
COMPANY, a Corporation,

Appellant,

vs.

SUDDEN & CHRISTENSON, Claim-  
ants of the Cargo of the American  
Steamship "TAMPICO",

Appellee.

No. 3910

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## BRIEF FOR APPELLANT

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*Upon Appeal From the Southern Division of the United  
States District Court for the Northern District  
of California First Division.*

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## STATEMENT OF THE CASE

This is a second appeal in this cause. The prior appeal was by the present appellee from a decree and judgment of the District Court in favor of the Crossett Western Lumber Company and against Sudden & Christenson. The case was reversed in this court and

sent back to the District Court to ascertain and adjudge the amount, if any, to be awarded the libelant upon the issues created by the libel and the answer thereto, and the damages, if any, to be awarded to the appellant under the issues arising upon the cross-libel, and to enter a decree accordingly.

There is in the record (Apostles, pages 44 and 45) a stipulation and an order that the apostles on appeal in the former appeal shall be considered as part of the record on this appeal, and that it will be unnecessary to reprint such portion of the record as is included in the apostles on appeal in the former appeal. A similar stipulation was made as to the exhibits, so that by stipulation and order of court, the case is now here on the record made on the prior appeal, together with such additional record as is necessary to show matters occurring subsequent to the decision on the prior appeal.

In order to distinguish between the apostles on this appeal and the apostles on the former appeal, made a part of the record on this appeal by stipulation of the parties and order of court thereon, we will refer to them in this brief as "first apostles" and "second apostles".

In order not to tax the memory of the court as to the salient points of the record in this cause, we will, as briefly as possible, review the facts of the case in order that there may be a clear understanding of the questions presented on this appeal.

On April 15, 1915, the Pacific Coast Steamship Company, the owner of the steamship "TAMPICO",



chartered that vessel to the Crossett Western Lumber Company. The charter-party provided for the redelivery of the vessel to the owner not later than July 1, 1916, unless the date of redelivery should be extended. The charter-party contained the further provision that the owner might, if it should so elect, require that the vessel be redelivered to it at Seattle, Washington, May 15, 1916, upon its giving written notice on or before February 1, 1916.

On October 18, 1915, the Crossett Western Lumber Company sub-chartered the steamship to Sudden & Christenson. The sub-charter-party gave to Sudden & Christenson the use of the steamship for a stipulated voyage, with the option of a second voyage. There was on the sub-charter-party a marginal provision as follows: "Subject to the conditions of redelivery as per charter between the Crossett Western Lumber Company and Pacific Coast Company".

On December 20, 1915, Sudden & Christenson wrote to Crossett Western Lumber Company and asked for a copy of the charter of the "TAMPICO" from the Pacific Coast Steamship Company to the Crossett Western Lumber Company.

Instead of sending a copy of this charter as requested, the manager of the Crossett Western Lumber Company wrote a letter to Sudden & Christenson under date of December 27, 1915, advising them that the charter between the Crossett Western Lumber Company and the Pacific Coast Steamship Company was practically the same as the charter on the Steamship "EUREKA", a



copy of which Sudden & Christenson had, except that the "TAMPICO" was to be redelivered about June 15, 1916, instead of May 15, 1916.

On December 31, 1915, Sudden & Christenson notified the Crossett Western Lumber Company of its intention to exercise the option for a second voyage.

This court on the prior appeal held that, notwithstanding the terms of the charter-party, the Crossett Western Lumber Company, by failing to mention the anticipation privilege, was estopped thereby from declaring a termination of the sub-charter prior to the 15th day of June, 1916, if, relying on this incorrect statement, Sudden & Christenson entered into a new contract.

The Pacific Coast Steamship Company on January 7, 1916, notified the Crossett Western Lumber Company that it required a redelivery of the vessel by May 15, 1916, and on January 10, 1916, the Crossett Western Lumber Company wired Sudden & Christenson as follows:

"Under no circumstances can we allow TAMPICO go to Atlantic Coast.

CROSSETT WESTERN LUMBER COMPANY."

Further correspondence followed, but Crossett Western Lumber Company adhered to the position taken that the "TAMPICO" could and would not be allowed to go to the Atlantic Coast.

Notwithstanding, and with full knowledge of the position of Crossett Western Lumber Company, Sud-

den & Christenson, as sub-charterers, began the second voyage February 22, 1916, and sent the vessel to South America to load a cargo of nitrate for W. R. Grace & Co.

Long prior to the events just narrated, in September, 1915, Sudden & Christenson had chartered to W. R. Grace & Co. the steamer "EUREKA", to carry a cargo of nitrates from the West Coast of South America to New York, but the closing of the Panama Canal had prevented the voyage.

Seeking to fulfill this existing obligation to W. R. Grace & Co. created by the charter of the "EUREKA", Sudden & Christenson undertook to substitute the "TAMPICO" for the "EUREKA", the "TAMPICO" being in the Pacific Ocean.

D. B. Dearborn & Co. of New York were New York agents for Sudden & Christenson for chartering for their account and for the handling of their vessels on the Atlantic Coast. January 4, 1916, Dearborn & Co. sent a letter to W. R. Grace & Co. reading as follows:

"January 4, 1916.

Messrs. W. R. Grace & Co.,

New York City.

Attention Mr. Fischer:

Dear Sirs:

Yours of the 3d received.

'TAMPICO': We confirm your statement that this steamer is substituted for the 'EUREKA' and

if the Canal is closed (14) when she is ready to sail from nitrate port she is to proceed to San Francisco with \$1 per ton less freight than via the Canal, say \$8 per ton.

Very truly yours."

Attached to this letter was a copy of the charter-party of the "EUREKA" and they were sent in the attempt to meet the obligation created by that charter-party.

There is no evidence that D. B. Dearborn & Co. had any knowledge or were advised of the correspondence between Sudden & Christenson and Crossett Western Lumber Compnay, above narrated.

The letter of January 4, 1916, was written in an attempt to use the "TAMPICO" in place of the "EUREKA" to fulfill the obligation of a subsisting charter-party and Sudden & Christenson entered into no new engagement with W. R. Grace & Co.

Under this situation, and while the Panama Canal was still closed and no one had any idea as to when it could be reopened, and with the definite knowledge that under no circumstances would the "TAMPICO" be permitted to go to the Atlantic Coast, Sudden & Christenson began a second voyage February 22, 1916, sending the steamer to South America to load a cargo of nitrate for W. R. Grace & Co.

A reading of the evidence leads irresistibly to the conclusion that Sudden & Christenson expected the

vessel to return to San Francisco and deliver the cargo there, and that the claims set up in this cause were a pure afterthought.

The vessel took her cargo of nitrate and returned to San Francisco and unloaded her cargo there. But accidents happened during the voyage and these accidents undoubtedly suggested to Sudden & Christenson the claims now asserted.

The steamer struck a rock and was delayed several days for repairs. This delay was sufficient so that when the "TAMPICO" arrived off the Pacific entrance to the Panama Canal the Canal was opened for navigation and it would have been possible to have gone through the Canal; but the Captain of the vessel, acting on instructions from the Pacific Coast Steamship Company prior to loading, proceeded to San Francisco where the cargo was unloaded and delivered to W. R. Grace & Co., and the vessel redelivered to Crossett Western Lumber Company May 19, 1916.

On the prior appeal this court held that when Sudden & Christenson applied to the Crossett Western Lumber Company for information as to the date of termination of the charter, and Crossett Western Lumber Company replied giving the date but failing to state that the owners had the right to anticipate that date on giving notice, *if* Sudden & Christenson *relying thereon*, proceeded to sub-charter the vessel to W. R. Grace & Co., that Crossett Western Lumber Company was thereby estopped from thereafter claiming a return of the vessel at the earlier date, and that thereafter the earlier termi-



nation of the voyage by the action of the Captain in taking the steamer to San Francisco, rather than going through the Canal to New York, was an actionable wrong against Sudden & Christenson for which they were entitled to damages, and the cause was referred back to the District Court to ascertain what was the contractual relationship between Sudden & Christenson and Crossett Western Lumber Company, and what, if any, damages Sudden & Christenson had suffered.

In the District Court judgment was again given against Sudden & Christenson and in favor of Crossett Western Lumber Company for the unpaid charter hire for the steamship "TAMPICO" up to the date and hour of redelivery, but judgment for damages in favor of Sudden & Christenson against Crossett Western Lumber Company in a larger amount than the charter hire unpaid, was given, with a net judgment in favor of Sudden & Christenson against Crossett Western Lumber Company, from which this appeal is now taken.

This appeal presents several questions, within the rulings of this court on the prior appeal:

First: The record contains no evidence showing that Sudden & Christenson entered into a *new* contract with W. R. Grace & Co. *relying on* any statement or representation by the Crossett Western Lumber Company.

Second: This court on the prior appeal held that there was no evidence before it on which it could award damages against the Crossett Western Lumber Com-



pany, and remanded the case in order that that evidence might be supplied. The only evidence taken on such remand is a repetition of evidence already to be found in the record, and no new or additional evidence was presented. It is our contention that the District Court erred in awarding Sudden & Christenson damages upon evidence which the Circuit Court of Appeals had in effect declared to be insufficient.

Third: No evidence has been offered showing Sudden & Christenson as entitled to damages within any recognized rule governing the awarding of damages for breach of contract.

Fourth: It affirmatively appears from the evidence offered on behalf of Sudden & Christenson that Sudden & Christenson are claiming damages arising out of a voyage undertaken in violation of the charter-party from Crossett Western Lumber Company to Sudden & Christenson, which forbade a sub-charter without consent, and no consent was given.

Fifth: That if there was a breach by Crossett Western Lumber Company, it occurred January 10, 1916, and the attempted voyage to New York, alleged to have been entered upon, was wrongful, because of the rule against enhancing damages where there has been an "anticipatory breach".

Sixth: Finally, assuming the existence of a contractual relation and a breach, all the evidence of the record does not justify a finding of anything more than nominal damages in favor of Sudden & Christenson.

## ARGUMENT

**Doctrine of estoppel as laid down in the opinion of the  
Circuit Court of Appeals not applicable to the  
facts as now developed.**

In the course of its opinion this court used this language with reference to the claim that the Crossett Western Lumber Company was estopped by its letter and its failure to advise Sudden & Christenson of the anticipation clause in the original charter from setting up the literal terms of the contract as a defense to Sudden & Christenson's claim for damages:

“The appellant's (Sudden & Christenson) defense to the original libel and its claim for damages in the cross-libel, rest upon estoppel, and to establish estoppel it must show that *relying upon the representations of the appellee*, it changed its position to its injury.” (The italics are ours.)

Under the rule thus laid down, it was incumbent upon Sudden & Christenson not merely to prove that the Crossett Western Lumber Company wrote the letter and that it subsequently entered into a contract, but also that it entered into such contract *relying upon the representations* made. It is not enough that *somebody* knew of the representations. It is also requisite that the action taken was in reliance upon such representations. If, therefore, the action taken was taken without knowledge of those representations on the part of the *active agent* in the negotiations, then the condition established by the court has not been met.

This court sent the case back to the District Court to ascertain just what were the contractual relations between the parties and what damages had been suffered, if any.

Pursuant thereto, there was taken the testimony of but one witness, Arthur B. Cahill, for Sudden & Christenson, and little that was new was developed therefrom. This witness had testified on the former trial, and he merely repeated what he had previously testified, and had very little personal knowledge from which to testify, and he added nothing to the evidence which this court had found insufficient as a basis for assessing any damages in favor of Sudden & Christenson.

Cahill's testimony discloses that the negotiations, pursuant to which the vessel was chartered to W. R. Grace & Co., were conducted by D. B. Dearborn & Co. of New York.

"Q. Who are D. B. Dearborn & Co. of New York?

A. D. B. Dearborn & Co. of New York were our New York agents.

Q. In the course of their duties as your agents, did they customarily contract for vessels in their own name?

A. Yes, sir.

Q. And for your account?

A. Yes, sir.

Q. Between whom were the negotiations that you have testified to between Sudden & Christenson and W. R. Grace & Co. for the "TAMPICO" conducted?

A. They were conducted by D. B. Dearborn.

Q. With what office of W. R. Grace & Co.?

A. The New York office of W. R. Grace & Co."

(Second Apostles, pp. 15 and 16.)

And on page 21 Cahill admitted that he had no personal knowledge.

The testimony of Dearborn was not offered.

No attempt was made to show that the letter from Crossett Western Lumber Company to Sudden & Christenson was communicated to D. B. Dearborn & Co. or that D. B. Dearborn & Co. was not aware of the exact provisions of the charter which permitted a demand for an earlier return of the vessel.

Under the circumstances it very probably was the fact that D. B. Dearborn & Co. had in their possession the charter-party, the terms of which Sudden & Christenson wrote to Crossett Western Lumber Company to inquire.

D. B. Dearborn & Co. were New York agents of Sudden & Christenson for the purpose of "chartering for our account, for the handling of our vessels on the Atlantic Coast."

In order for Sudden & Christenson to recover damages upon the basis of the rules of estoppel laid down in this case, it was not enough to prove that Crossett Western Lumber Company wrongfully advised Sudden & Christenson that the "TAMPICO" did not have to be returned until June 15.

It would be necessary to go further and prove that this information was imparted to D. B. Dearborn & Co., the general agents conducting the negotiations with W. R. Grace & Co., and that D. B. Dearborn & Co. acted in reliance thereon, and in ignorance of the terms of the charter-party itself.

But, it is pertinent to inquire just what was the charter-party which D. B. Dearborn & Co., as agents for Sudden & Christenson, are assumed to have made with W. R. Grace & Co., and see if there was actually any *new* engagement *then* entered into.

It appears that long prior, in September, 1915, Sudden & Christenson chartered to W. R. Grace & Co. the steamer "EUREKA," to carry a cargo of nitrates from the West Coast of South America to New York, and were bound thereby, and were seeking to fulfil that obligation with some other vessel because the closing of the Panama Canal prevented the "EUREKA" from going to South America. (Second Apostles p. 12.)

"A. Sudden & Christenson entered into a contract to move a cargo of nitrate from the West Coast of South America to the East Coast of the United States.



Q. On what vessel was that, Mr. Cahill?

A. On the steamer 'EUREKA.'

Q. And what happened with reference to that engagement between Sudden & Christenson and W. R. Grace & Co.?

A. Sudden & Christenson were obligated to move this cargo by the steamer 'EUREKA' and wanted to substitute the steamer 'TAMPICO.' "

(Second Apostles, p. 12.)

And because of that obligation then subsisting and binding, D. B. Dearborn & Co., as agents for Sudden & Christenson, wrote the letter of January 4, 1916, to W. R. Grace & Co.:

"January 4, 1916.

Messrs. W. R. Grace & Co.,

New York City.

Attention, Mr. Fischer:

Dear Sirs:

Yours of the 3d received.

'TAMPICO': We confirm your statement that this steamer is substituted for the 'EUREKA' and if the Canal is closed (14) when she is ready to sail from nitrate port she is to proceed to San Francisco with \$1 per ton less freight than via the Canal, say \$8 per ton.

Very truly yours."

(Second Apostles, p. 16.)

From this, it is evident that no *new* obligation was entered into by Sudden & Christenson relying on the letter of Crossett Western Lumber Company. Sudden & Christenson were already bound to W. R. Grace & Co. and liable in damages if they failed to move the cargo of nitrates. That liability arose from the contract entered into the preceding September, and not from the letter of January 4, 1916, just quoted.

The letter of January 4, 1916, created no new obligation and no new engagement was entered into then or at any time, relying on the letter of Crossett Western Lumber Company giving the date of expiration of the charter of the "TAMPICO" or otherwise.

The letter of January 4, 1916, was written in an attempt to use the "TAMPICO" in place of the "EUREKA" to meet the obligation of the charter-party of the previous September, and Sudden & Christenson made thereby no new contract with W. R. Grace & Co. and assumed no new liability.

This evidence was all before the court and the items of damage now claimed were presented to this court on the former hearing and not allowed. The court sent the same back to the District Court to permit the taking of further evidence.

In its opinion there was something lacking. We submit that that lack has not been supplied by Mr. Cahill's repetition of his former testimony, which was all the evidence offered on the second trial.

Conceding that the letter of Crossett Western Lumber Company to Sudden & Christenson would serve as the basis of an estoppel, it does not appear that any *new contractual relations were entered into relying thereon.*

In view of this condition of the record, and in view of the fact that this court on the former appeal did not allow the claim of Sudden & Christenson, we respectfully submit that no additional reasons have been shown why the claim should be allowed.

In the absence of additional evidence this court should not now allow what it did not then allow.

“It is not the habit of this court to consider points again open for discussion which have been once deliberately decided, and which have furnished the groundwork of the judgment already rendered in the same cause in a former stage of its proceedings.”

United States vs. 422 Casks of Wine, 1 Pet. 547;  
7 L. Ed. 257.

“Seventh syllabus. Where an appellate court decides that certain evidence is insufficient to establish a fact in controversy, it will regard the question as *res judicata* on a subsequent appeal from a new trial upon substantially the same evidence, notwithstanding the introduction on the new trial of additional but merely cumulative evidence of the same character.”

Westfall vs. Wait, 165 Ind. 353; 73 N. E. 1089;  
6 Ann. Cas. 788.

To the report of this case in 6 Annotated Cases is appended an exhaustive note collating other numerous authorities holding uniformly in accord with the syllabus quoted.

See also *Standard Sewing Machine Co. vs. Leslie*, 118 Fed. 557; *King vs. La Grange*, 61 Cal. 231.

But let us now, for the purposes of this argument, assume certain things which, nevertheless, we contend are not proven.

Assume that by reason of the letter, Crossett Western Lumber Company was estopped to claim a return of the vessel prior to June 15 because Sudden & Christenson had entered into an agreement binding on it, relying on that letter as a correct statement of the limits of their rights.

The question then arises as to whether that agreement was one which they had a right to make under the terms of their charter from Crossett Western Lumber Company.

If it was not, then, of course, they can base no claim for damages on the assertion that they were prevented from fulfilling such agreement.

They cannot collect damages from Crossett Western Lumber Company because of their failure to comply with a charter to W. R. Grace & Co. which they made in violation of their contract with Crossett Western Lumber Company.

The charter of the "TAMPICO" from Crossett Western Lumber Company to Sudden & Christenson, clause 27, (First Apostles, p. 14), forbade a sub-charter by Sudden & Christenson without the consent of Crossett Western Lumber Company.

"27. Charterers to have the option of subletting the steamer, provided consent of owners is obtained."

It cannot be disputed that no consent was ever given, nor does it appear that it was even asked for.

Sudden & Christenson ignored this provision of their charter in dealing with W. R. Grace & Co., and attempted to substitute the "TAMPICO" for the "EUREKA" under the existing charter of the "EUREKA."

"A. We never consented to any sub-charter."

(Testimony of Mitchell, then manager of Crossett Western Lumber Company, First Apostles, p. 53.)

While there has been an attempt to assume that the agreement between Sudden & Christenson and W. R. Grace & Co. was not a charter, yet such assumption is clearly an afterthought, as appears both from an inspection of the writing and from the testimony of Sudden & Christenson's witnesses with reference thereto.

The charter from Sudden & Christenson to W. R. Grace is in evidence as "Christenson's Exhibit 1." (Second Apostles, p. 10; First Apostles, p. 114.)



Throughout this instrument W. R. Grace & Co. are referred to as "Charterers," and it is stipulated that the vessel shall proceed as charterers "direct, to port or ports within the range of above options" and that the "Master shall receive orders from W. R. Grace & Co., New York."

That Sudden & Christenson held that they had "sub-chartered" to W. R. Grace & Co. is evidenced by their stipulations and by the testimony of their witnesses. At the bottom of page 10 of Second Apostles is a stipulation in which the agreement is referred to as a "Charter-party." In paragraph VI of the stipulation of facts, page 143 of First Apostles, it clearly appears that the "TAMPICO" was sub-chartered to W. R. Grace & Co.

In Cahill's testimony he refers to it as a "charter-party" and says that D. B. Dearborn & Co., who negotiated the contract on behalf of Sudden & Christenson, were agents of Sudden & Christenson, "For chartering for our account, for the handling of our vessels on the Atlantic Coast," and counsel for Sudden & Christenson in examining Mr. Cahill referred to the "charter-party."

Clearly, if it was a "charter-party," entered into without obtaining from Crossett Western Lumber Company the consent which the charter from Crossett Western Lumber Company to Sudden & Christenson required, then Sudden & Christenson can not pass along to, and collect from, Crossett Western Lumber Company the claim of W. R. Grace & Co. against Sudden & Christenson, because for any reason Sudden & Christ-

enson failed to complete their undertaking with W. R. Grace & Co.

Based on the assumption that Crossett Western Lumber Company were estopped to demand a return of the vessel prior to June 15, Sudden & Christenson could use the vessel until that date in any way permitted by their charter, and collect damages for any invasion or restraint on their right so to use. But it does not follow that they can collect damages for which they may have become liable for an attempted use of the vessel not permitted by their charter-party.

Of course the actual liability of Sudden & Christenson to W. R. Grace & Co. was based on the charter of the "EUREKA" in September, 1915, and was fixed then, and the attempt to substitute the "TAMPICO" neither created nor affected that liability.

### **Application of the Doctrine of "Anticipatory Breach"**

But for the purposes of this argument only, let us make a further assumption and see that still Sudden & Christenson would not be entitled to the damages claimed.

Let us for the moment assume that Sudden & Christenson had a right to make charter-party to W. R. Grace & Co. for the voyage and for a return to New York, and that they were prevented from complying with their obligation to W. R. Grace & Co., and that Crossett Western Lumber Company breached its contract with Sudden & Christenson.

The question then arises as to when and how Crossett Western Lumber Company breached its obligation, and the answer is obvious that the breach, if any, occurred before the "TAMPICO" began the voyage to South America, and Sudden & Christenson started the vessel, knowing absolutely that she would not be permitted to sail to the port of New York, regardless of whether or not the canal should be reopened.

The vessel started on this voyage February 22, 1916. (second Apostles, p. 19.) On January 10, 1916, nearly a month and a half before the voyage began, the Crossett Western Lumber Company notified Sudden & Christenson by wire that

"Under no circumstances can we allow 'TAMPICO' to go to Atlantic Coast."

This determination was repeated in the ensuing correspondence.

Following the assumption above noted as to the existence of a contract relation, this wire was a clear and unequivocal "anticipatory breach." The breach, if there was one, occurred then.

The law is well settled as to the liabilities and the rights of the parties where there has been an anticipatory breach. Thereafter, Sudden & Christenson had no right to pursue any course of action which would enhance the damages necessarily resulting from the breach evidenced by that telegram and the firm declaration that under no circumstances would the "TAMPICO" be permitted to go to the Atlantic Coast.

When the Crossett Western Lumber Company sent that telegram it became then, if at all, immediately liable for the direct and ordinary damages resulting therefrom.

What such damages would be is well established by long settled rules of law as the market value of the nitrates in New York, less the cost in South America, and less the freight cost of transportation from South America to New York.

After the breach resulting from the telegram of January 10, 1916, no one had any right to pursue any course of action which would enhance those damages or result in an attempt to inject into the situation any other basis for the computation of damages.

Notwithstanding, Sudden & Christenson, forty-three days afterwards, sent the vessel to South America, and permitted the vessel to be loaded with nitrates, knowing full well that the cargo could not be delivered in New York and that the vessel was bound to return to a port on the Pacific Coast of the United States.

Whatever may be its bearing on the rights of the parties, the conclusion is inevitable that Sudden & Christenson never expected the vessel to go to New York, and it was only the accidental delay to the vessel owing to her striking a rock, that altered the undoubted expectation that she could not pass through a closed canal and had no alternative than to return to San Francisco.



The claim of an expectation and a right to go to New York was clearly an afterthought, based on the accident to the ship.

It is inconceivable that Sudden & Christenson would have deliberately loaded cargo for New York, knowing that the vessel would not be permitted to sail to that port. Beyond a reasonable doubt, the vessel was loaded for San Francisco, and the claim for damages based on a delivery at that port was an afterthought.

But be that as it may, the measure of damages was fixed by the telegram of January 10, 1916, at the market value of the nitrates in New York, less the cost and the freight.

There is no evidence in the record as to the value of nitrates in New York or in South America. There is no proper basis on which can be computed the damages suffered as a result of the refusal of Crossett Western Lumber Company to permit the vessel to go to the Atlantic Coast, and the most the court could do is to award nominal damages for the technical breach founded on the declaration of January 10, 1916, for where there has been, as here, an "anticipatory breach," the injured party cannot nevertheless proceed, and, taking advantage of an unexpected and accidental combination of circumstances, create another and different and more burdensome basis for the computation of damages.

The rights and liabilities of the parties were fixed January 10, 1916.



## No Competent Evidence on the Question of Damages

But to pursue the argument in this case another step with another assumption:

Assume for the moment that it were permissible to seek to compute damages on the basis of a right to delivery in New York, yet we maintain that no evidence has been offered to sustain the damages allowed by the District Court.

We will first discuss the question of the amount of the damages awarded Sudden & Christenson, and thereafter will consider whether Sudden & Christenson were entitled to any damages at all.

The claim presented by Messrs. Sudden & Christenson was summed up in a statement presented in the course of his testimony by one of their witnesses, and virtually speaking, the statement is expected to prove itself, because as to the principal item thereof, no evidence is offered to show the correctness thereof. The claim presented by Messrs. Sudden & Christenson is as follows (First Apostles, page 128):

Excess time coming to San Francisco, as	
above, 4-1/6 days at \$325.00 . . . . .	\$ 1,354.25
Fuel, 100 hours at 3.737 barrels per hour	
at \$2 . . . . .	747.40
Time lost in San Pedro fueling, 13 hours	
52 minutes, at \$325.00 . . . . .	188.24
Commission, 2 1/2% on charter hire, \$67,-	
540.39 at 2 1/2% . . . . .	1,688.50

Deducted by charterers from freight  
 money account delivery of cargo at  
 San Francisco instead of New York,  
 2787 tons nitrate at \$4.70 per ton. . . . 13,098.90

---

Total . . . . . \$17,077.29

Less Panama Canal tolls,  
 1654 net tons at \$125. . . . \$2,067.50

Usual time occupied in transit  
 through canal 8 hours, at  
 \$13.54 . . . . . 108.32

Usual fuel consumed in transit  
 through canal, 4 hours at  
 3.737, 14.948 barrels at \$2      29.90      2,205.72

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Leaving a balance due of . . . . . \$14,871.57

The principal item in this claim is as follows:

Deducted by charterers from freight  
 money account delivery of cargo at  
 San Francisco instead of New York,  
 2787 tons nitrate at \$4.70 per ton. . . . \$13,098.90

In this statement the word "charterers" means W. R. Grace & Co., and the item means that W. R. Grace & Co. deducted from the amount due from them to Sudden & Christenson for the transportation of the cargo of nitrate \$13,098.90.

We think no other conclusion can be deduced from the record than that Sudden & Christenson accepted this claim of W. R. Grace & Co. without question or comment, and it is offered as an item of damage against Crossett Western Lumber Company without evidence

or proof of the right of W. R. Grace & Co. to deduct that specific amount, or any amount. It is purely an arbitrary figure, unexplained and unsupported.

“Mr. Montgomery. Q. If I understand you correctly, then, the sum of \$13,098.90 which you read into the record from a memorandum which you held in your hand, and which you are now seeking to charge against Crossett Western Lumber Company, was made up entirely of that item contained in the statement furnished you by W. R. Grace & Co., without specific knowledge on your own part as to the accuracy of any of the items contained in that statement. Isn’t that correct?

A. Yes, sir.”

(First Apostles, page 133.)

We submit that the fact, *if it is a fact*, that Sudden & Christenson submitted to an arbitrary deduction on the part of W. R. Grace & Co., does not entitle Sudden & Christenson to set up such deduction as an item of damages against the Crossett Western Lumber Company. There must be evidence that the item was rightfully deducted.

By the question just quoted, counsel for the Crossett Western Lumber Company challenged the character of the testimony, and thereafter (First Apostles, page 134) made a motion “to strike out the testimony of the witness with reference to the items of damage to which he has testified, and particularly as to the item of \$13,-

098.90, on the ground that it appears from the witness' testimony that he has no personal knowledge of the accuracy of the amount or the item which went to make up that amount."

The response of counsel for Sudden & Christenson to this motion was to offer in evidence, over objection, "Cahill's exhibit 3," which was apparently an itemized statement of the account between Sudden & Christenson and W. R. Grace & Co. without proof of the correctness of any of the items therein contained. Incidentally, "Cahill's exhibit 3" shows that W. R. Grace & Co. attempted to charge as the half cost of transshipment \$3.70 per ton instead of the \$4.70 shown in Cahill's testimony (First Apostles, page 128). It was also apparently the amount which the District Court used as the basis for its computation.

Assuming, now, for the purposes of argument that there was a breach by the Crossett Western Lumber Company of its charter-party to Sudden & Christenson, and a resulting breach on the part of Sudden & Christenson of its sub-charter to W. R. Grace & Co., and assuming that W. R. Grace & Co. were entitled to damages against Sudden & Christenson, and Sudden & Christenson, in turn, to pass on its damages to the Crossett Western Lumber Company, let us apply to this situation the general rules governing the awarding of damages and see if there is any evidence justifying the awarding of damages under any of such rules.

Parenthetically, we call attention to the fact that Sudden & Christenson and W. R. Grace & Co. have



themselves and by their own contract, fixed the measure of damages applicable. They agreed that it was worth to W. R. Grace & Co. \$9.00 per ton to have this freight delivered to New York and only \$8.00 to have it delivered in San Francisco. If Sudden & Christenson had been able to take this freight to New York, they would have been entitled to receive \$9.00 instead of the \$8.00 for delivering it to San Francisco. If Crossett Western Lumber Company prevented them from getting the \$9.00, and if, as a result of the Crossett Western Lumber Company's fault, they only received \$8.00, the charter fixes the maximum extent of Crossett Western Lumber Company's liability at \$1.00 per ton.

But, if we are to decline to consider the contract between Sudden & Christenson and W. R. Grace & Co. as fixing the measure of damages, then there is no basis for recovery of damages in this case for these reasons:

This whole claim for damages is based upon the assumption that W. R. Grace & Co. wanted the nitrates in New York City. Had the nitrates been lost in transit, the maximum measure of damages to which W. R. Grace & Co. would have been entitled for goods lost in transit would be their value at point of destination, New York.

There is no evidence in this case as to the market value of nitrates in New York, nor is there any evidence of the market value of nitrates in San Francisco where the nitrate was delivered and accepted. So far as this record goes, nitrates may have been more valuable in San Francisco than in New York, and in that



event W. R. Grace & Co. would not have been damaged by being compelled to accept delivery in San Francisco rather than in New York.

There is no evidence in this record that the nitrates ever went to New York, and there is in the record a statement that they were delivered to "some interior point" and not to New York. Unquestionably, if W. R. Grace & Co. had seen fit to have the nitrates transported from San Francisco to New York, they would have been entitled to recover as damages from Sudden & Christenson, the cost of transshipping from San Francisco to New York. However, the nitrates were never sent to New York, and therefore, W. R. Grace & Co. are not entitled to recover a damage which they never suffered.

Had they disposed of the nitrates in San Francisco at the market price prevailing in San Francisco, and that price had been lower than the market price prevailing in New York, they would undoubtedly have been entitled to recover the difference between the New York price and San Francisco price, less the additional \$1.00 they would have had to pay for delivering the goods to New York. But there is no evidence that the goods were disposed of either in San Francisco or New York, so that this basis of computing damages is not available.

The extent of the evidence is found in the testimony of Cahill. (First Apostles, pages 133 and 134.) After the witness Cahill had admitted, in response to a question by counsel for the Crossett Western Lumber Company, that he had no knowledge of the accuracy of any of the

items contained in the statement of damages claimed, he was asked by Sudden & Christenson's counsel:

"Q. Mr. Cahill, do you know what the freight rate was from San Francisco to New York on nitrate at the time this nitrate was discharged from the "TAMPICO?"

A. I don't remember the exact freight rate. I know that it was in the neighborhood of \$7.00 or \$8.00, and at the time of receiving this statement I—

Q. (Interrupting.) Mr. Christenson has just called my attention to the fact that the transshipment was made to some interior point instead of New York. In speaking of the rate being from \$7.00 to \$8.00, were you speaking of the rate to New York or to some inland point?

A. I don't remember just where the nitrate went, but I know that on receipt of this statement we verified the rate of freight charged to the point of destination."

It would appear from this testimony that the nitrates were shipped "to some inland point." What this inland point was is not shown, and yet it is very material. Suppose, for instance, that the inland point to which the nitrates were transhipped was midway between New York and San Francisco, at a point where the freight rate from San Francisco east was the same as the freight rate from New York west. If such a point was the point of transshipment, then W. R. Grace & Co. suffered no

damage whatever, because it would have cost them as much to have transhipped from New York as from San Francisco. We submit that damages cannot be based upon an inference from an inference.

That the point of transhipment was midway between New York and San Francisco is a fair inference from the testimony just quoted and Cahill's exhibit 3, wherein appears the item charged to Sudden & Christenson by W. R. Grace & Co. reading as follows:

“Half cost of transhipment at \$3.70, \$10,311.90.”

Mr. Cahill, in the testimony just quoted, testified that the freight rate from San Francisco to New York was in the neighborhood of \$7.00 or \$8.00, and \$3.70 is as near as it is possible to come to half of the sum not more definitely fixed than as “in the neighborhood of \$7.00 or \$8.00.”

We respectfully submit that giving the criticised testimony every possible benefit, it is insufficient to justify the charge by W. R. Grace & Co. against Sudden & Christenson, or by Sudden & Christenson against the Crossett Western Lumber Company. To justify charging as an item of damages either the half or the whole of the cost of transhipment from San Francisco “to some inland point,” it would be necessary to prove:

First, the point to which shipment was made;

Second, the cost of shipment from San Francisco to that point;

Third, the cost of shipment from New York to that point; and the excess only of the cost of shipment from San Francisco over the cost of shipment from New York would be a proper element of damages.

It is true that W. R. Grace & Co. might, if they had seen fit and could have done so without violating the rule making it obligatory to keep the damages as low as possible, have transported the nitrates to New York and from New York "to some inland point," and then charged Sudden & Christenson with the entire rate to New York, but it is evident from the record that this is not what was done, and it follows that W. R. Grace & Co. were entitled to recoup, not the damages which they might have suffered had they taken the nitrates to New York, but the damages which they did suffer.

But if the comment is made that the transshipment to an interior point where the freight rate was less was for the purpose of keeping down the loss involved in paying the full freight rate to New York, the reply is obvious that it would then become necessary to show the difference between the market price in New York and the point of shipment.

The court will take judicial knowledge of the fact that New York City is a point of arrival and distribution for commerce, and that the market price of any goods distributed from New York, in the absence of evidence to the contrary and special circumstances, must necessarily be the market price in New York plus at least the charge of transportation from New York to that



point. Obviously, otherwise, except under special circumstances, no goods would ever leave New York.

In the foregoing discussion we have endeavored to make plain our contention that from every point of view from which the relations of the parties may be considered, there was a lack of competent evidence to justify an award of damages against Crossett Western Lumber Company for the alleged breach of its contract with Sudden & Christenson.

This court on the former appeal could not find such evidence and sent the case back to the District Court to permit that lack to be supplied. But the most careful search of the evidence offered under this permission demonstrates that the evidence was not supplied, and that the only witness called merely repeated what he had testified on the former trial.

We submit at this point a group of quotations from text books of established reputation, on which we have relied in this argument, although we have taken our stand on principles of law so well established as to need no authorities to support them.

### III Sutherland on Damages (3d Ed.), page 2681.

“\* \* \* the measure of damages is the market value of the goods at the place to which they should have been carried, less the value at the place where the carrier agreed to receive them, and less freight.”



III Sutherland on Damages (3d Ed.), page 2677.

“If the subject to be transported be merchandise \* \* \*; if no other conveyance is available, that is, if none can be had at all, or if any which is attainable would be so expensive as to leave no margin of profit, then the owner suffers injury to the extent of the difference between the value of the property where it is and the value it would have at the place of destination, less the expenses of shipment under the contract to that place.”

III Hutchinson Carriers (3d Ed.), page 1620.

“If, by reason of a delay, there is no market value for the goods at the place of destination, and in consequence they are shipped to another market, the measure of damages will be the difference in value on the market at destination in the condition and at the time they should have arrived and the sum they were sold for on the other market.”

III Hutchinson Carriers (3d Ed.), page 1632.

“The party injured by the delay must not remain supine and inactive, but should make reasonable exertions to help himself, and thereby reduce his losses and diminish the responsibility of the party in default to him.”

“When the carrier enters into a contract to transport the goods, and afterwards refuses to accept or to convey them, it has been held that the true measure

of damages to which the owner of the goods is entitled is the difference between the market value at the destination to which they were to have been carried, at the time when they would have arrived there if the carrier had performed his contract, and their value at the same time at the place from which they were to have been carried, less the freight."

III Hutchinson Carriers (3d Ed.), page 1634, note 52.

"When a carrier receives goods for transportation, and fails to deliver them, the owner is entitled to recover the market value of the goods at the time and place to which they should have been delivered. And where the carrier negligently delays the delivery of goods, he is liable for loss in their market value during the delay."

Spring vs. Haskell, 4 Allen (Mass.) 112.

Cutting vs. Grand Trunk Railway, 13 Allen (Mass.) 381.

Ward's Line vs. Elkins, 34 Mich. 439 (quoted in III Hutchinson Carriers (3d Ed.), page 1637.)

"The damages to which Elkins was entitled, if any, would be such as should have placed him in the position he would have occupied had the salt been taken to Chicago by vessel as agreed. It was not an article of specific utility for preservation, but an article of merchandise, and only valuable as such.

The only advantage he could have gained by a timely shipment according to the contract would have been the excess of the value of the salt in the Chicago market, at the date when it should have arrived, beyond what it was worth in Bay City and the expenses of loading, shipment and delivery at his warehouse in Chicago. If there was no such excess in value at that time, then he was not damaged. If there was such an excess, then he was entitled to that and nothing more.

“He would not have been justified in procuring shipment by rail if the railroad prices would have rendered it unprofitable. There are, no doubt, cases where property is of such a nature, or where the necessity of having it at a certain point is so imperative, that the circumstances may justify employing any transportation which is accessible, and may render the difference in cost of transportation a proper measure of damages. But this can never be proper in regard to ordinary articles of consumption, always to be found on the market, and only valuable to the owner for their merchantable qualities.”

### III Williston on Contracts, Sec. 1299, page 2349.

“It need not be contended that in every case the principle of damages in question will deprive the plaintiff of the right to continue performance of the contract after it has been repudiated. There may be cases where so doing will not needlessly enhance damages, and it is a question of fact in every case

whether such enhancement of damage would be caused. But one distinction is to be observed, so far as the question here under consideration is concerned, between cases where repudiation or countermand takes place before manufacture or work under the contract has been begun and those where notice is given after work has been done, or manufacture begun by him. Where nothing has been done it will almost always be the proper course for the seller to refrain from doing anything, and the measure of his damages will be simply the profit he would have derived had the contract been carried out."

### III Williston on Contracts, Sec. 1344, page 2400.

"With the qualifications stated in the following sections, the plaintiff can recover for breach of contract compensation for only such consequences of the breach as are both proximate and natural."

### III Williston on Contracts, Sec. 1345, page 2400.

"Though any breach of contract entitles the injured party at least to nominal damages, he cannot recover more without establishing a basis for an inference of fact that he has been actually damaged. A mere possibility that the plaintiff might have made a profit if the defendant had kept his contract would not justify damages based on the assumption that the profit would have been made."



In conclusion, we submit:

1. That upon the second trial of this cause there was no new evidence which would bring the case within the doctrine of estoppel as laid down in the opinion of the Circuit Court of Appeals.

2. That under the circumstances Sudden & Christenson had no right to enter into the agreement which they did with W. R. Grace & Company.

3. That the damages, if any, were fixed by the telegram of January 10, 1916, and Sudden & Christenson had no right thereafter to augment the damages by loading a cargo for New York.

4. If Sudden & Christenson submitted to an arbitrary deduction on the part of W. R. Grace & Company, that does not entitle Sudden & Christenson to set up such deduction as an item of damages against Crossett Western Lumber Company without evidence or proof that the item was rightfully deducted. There was no evidence in the case which, under the rules of damages, would justify the awarding of damages in favor of Sudden & Christenson and against Crossett Western Lumber Company.

5. All the evidence now before the court was before it on the former appeal, and there found insufficient as the basis of an award of damages to Sudden & Christenson. The permission to take further testimony resulted in no additional facts.

Respectfully submitted,

PLATT & PLATT, MONTGOMERY & FALES,

Proctors for Appellant.



No. 3910

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

7

CROSSETT WESTERN LUMBER COMPANY (a corporation),

*Appellant,*

vs.

SUDDEN & CHRISTENSON, claimants of the cargo of the American Steamship "TAM-PICO",

*Appellee.*

BRIEF FOR APPELLEE.

IRA S. LILLICK,

*Proctor for Appellee.*

THEODORE M. LEVY,

*Of Counsel.*

FILED

OCT 23 1922

F. D. MONCKTON,  
CLERK



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*Appellee.*

## BRIEF FOR APPELLEE.

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### Statement of the Case.

This case comes again before this Court upon a second appeal and pursuant to a last, and what we feel must necessarily be a fruitless attempt on the part of the appellant to avoid and defeat the decree and judgment of this Court in favor of the appellee (*The "Tampico"*, 270 Fed. 537). We are not able to entirely agree with appellant's statement of the case appearing on pages 1 to 9 inclusive of its brief, for the reason that appellant has

therein attempted, by implication, to again argue matters that have been finally determined in the case by this Court on the prior appeal. There is one, and only one question that this Court has not finally and conclusively determined. All of the other issues of this case, including those attempted to be raised in appellant's brief are *res adjudicata*. The facts and issues of the case are stated in the opinion of this Court, so much more clearly and concisely than we could hope to state them, that we have taken the liberty of including the opinion in this brief. We have italicized certain portions of the opinion and have added certain marginal notations, so that the attention of the Court may be called to those portions of the opinion to which we will herein refer. It must be borne in mind that, in the quoted opinion, the "appellant" is Sudden & Christenson (appellee herein) and the "appellee is Crossett Western Lumber Co. (appellant herein).

#### OPINION.

"On April 15, 1915, the Pacific Coast Steamship Company, the owner of the Steamship Tampico, chartered the vessel to the appellee. The charter party provided for redelivery of the vessel to the owner not later than July 1, 1916, unless the time of redelivery should be extended by the owner for a further period of 60 days. But it contained the further provision that the owner might, if it should so elect, require that the vessel be redelivered to it at Seattle, Washington, on or about May 15, 1916, upon its giving to the appellee on or before February 1, 1916, a written notice to that ef-

fect, and it provided that on such notice being given the vessel might be redelivered at any time between April 1, 1916 and May 15, 1916. On October 18, 1915 the appellee subchartered the steamship to the appellant. The subcharter party gave to the appellant the use of the steamship for a stipulated voyage, with the option to use the same for a second voyage upon the same terms and conditions as the first. It contained a marginal provision as follows: 'Subject to the conditions of redelivery as per charter between Crossett Western Lumber Company and Pacific Coast Company'. The appellant performed the first voyage and thereafter on December 31, 1915, it duly notified the appellee in writing that it intended to exercise its option for a second voyage. The notice was required to be in writing, and to be given 20 days at least before the second voyage was undertaken. On January 3, 1916, the appellee acknowledged receipt of the notice. On January 7, 1916, the Pacific Coast Steamship Company notified the appellee that it required a redelivery of the vessel by May 15, 1916. On January 11, 1916, the appellee telegraphed the appellant as follows: 'Our charter has clause Tampico must be delivered May fifteenth if notified by February first. Pacific Coast served notice today. We there notify you.' On the following day the appellant replied directing the attention of the appellee to its previous statement that the appellee's charter on the Tampico expired not later than June 15, and stating that the appellee expected 'to be able to redeliver at an Atlantic port on or about May 4th if canal be open, or if canal be closed, on Pacific Coast port on or about May 10th next.' \* \* \* We do not understand your telegram under date of January 11th, and we would like you to advise us at



once on what ground the Pacific Coast S. S. Co. claims the right to notify you that the Tampico must be redelivered by May 15, 1916.' To that letter the appellee answered referring to the terms of its charter with the owner. The second voyage was begun on February 22, 1916. The vessel went to the coast of South America, and there loaded a cargo of nitrate and thence started northward, and arrived at the Pacific entrance to the canal about April 29, 1916. The canal was then open for navigation. The captain of the vessel had received instructions from the owner prior to the loading 'to proceed as charterer's agent directed, but to load for San Francisco'. Pursuant to these instructions he proceeded to San Francisco, where the vessel was redelivered to the appellee on May 19, 1916. The appellant withheld the charter hire of the vessel from April 23, 1916 to May 19, 1916, amounting to \$8,492.88, contending that it had the right to complete the voyage through the canal to the Atlantic Coast and then make redelivery of the vessel prior to June 15, 1916, in accordance with the terms of the charter party. The appellee filed its libel to recover the unpaid charter hire. The appellant answered, setting up the defense that the appellee had failed to perform the conditions of the charter party, and that the appellant had been damaged thereby; and the appellant filed a cross libel setting up the facts with regard to the second voyage and claiming damages in the sum of \$14,871.57. Answering the cross libel, the appellee pleaded the defense that the charter party between the appellee and the appellant was subject to the condition of redelivery contained in the charter party between the appellee and the owner. *Upon the*

*pleadings and the evidence, the court below found that the condition for redelivery contained in the charter party from the owners to the appellee was binding upon the appellant, and judgment was entered for the appellee for the unpaid charter hire from April 23, 1916 to May 19, 1916, and the cross libel was dismissed.*

Theory upon which case was decided in Court below on the first trial (reversed).

Gilbert, Circuit Judge, after stating the case: The conclusion of the court below was based upon the rule which was applied by this court in *Conner v. Manchester Assur. Co.*, 130 Fed. 743, where he held that an insurance certificate containing the provision that its terms were subject to all the terms and conditions of a certain open policy in the possession of the insurance company, bound the insured to the provisions of such open policy, although he had no knowledge of the contents thereof. The facts in the present case, we think, take the controversy out of the rule there announced. The appellee held the *Tampico* under a charter from its owner. It entered into a charter party with the appellant for a prescribed voyage, giving it the option to use the vessel for a second voyage of a similar nature. The contract was expressly made subject to the provisions of the original charter from the owner to the appellee. The appellant sent the vessel on her first voyage. At that time it had not determined whether or not it would exercise the option for a second voyage. On December 17, 1915, the appellee wrote to the appellant inquiring whether it would want the vessel for another voyage. On December 20 the appellant answered saying, 'Will you please send us copy of your contracts with the Pacific Coast Company with reference to this steamer. We have a copy of the *Eureka* contract, but not of the charter of the *Tampico*. \* \* \* As soon as we have

Negotiations  
for contract  
between  
Sudden &  
Christenson  
and W. R.  
Grace & Co.

Contract  
between  
Sudden &  
Christenson  
and W. R.  
Grace & Co.

this information we hope to be able to answer promptly as to whether or not we will want to use the vessel for another trip.' *At that time the appellant was negotiating with W. R. Grace and Company for the use of the Tampico for a second voyage.* The letter of December 20 was sent in order to ascertain the date of the appellee's redelivery obligation to the owner. On December 27, 1915, the appellee answered saying that its charter of the Tampico from the owner 'reads practically the same as that of the Eureka except that we are to make redelivery about June 15', and the letter closed with the request that on receipt thereof the appellant advise the appellee of its decision as to the option. *Upon receipt of that letter the appellant closed its negotiation with W. R. Grace & Company and fixed the vessel for the second voyage.* On December 31, 1915, the appellant wrote to the appellee: 'We will exercise our option of the second voyage of the steamer "Tampico"; On January 3, 1916 the appellee acknowledged receipt of that notice and said, 'As we formerly wrote you the charter of this boat expires not later than June 15, 1916.' These communications from the appellee answered the appellant's inquiry as to the term of the original charter party. The appellant had asked for a copy of that charter for the purpose of ascertaining the length of time for which the owner had parted with the right of possession. The letters conveyed that information fully and completely. The appellant had the right to reply on the information so furnished. It had the right to believe that there was no provision in that charter party by which the term thereof could be abbreviated at the option of the owner. *The representation was made with the intention that it should be acted upon. It was a representation such as to induce a reasonable and prudent man to believe that it was intended to be acted upon,*

Sudden &  
Cristenson  
relied and  
acted upon  
the repre-  
sentations  
of Crossett-  
Western  
Lumber Co.



*and the appellant in acting upon it exercised such reasonable diligence as the circumstances required.* The situation is the same as it would have been had the appellee sent the appellant a copy of that charter party with the optional provision in favor of the owner inadvertently omitted therefrom. The appellee knew for what purpose the information was sought, *and it was advised of the voyage which the appellant had in contemplation.* For further information it referred the appellant to the charter which the appellee had from the owner of the Eureka, a copy of which was in the possession of the appellant. That charter party contained no provision by which the term thereof could be abbreviated at the option of the owner.

Crossett-Western Lumber Co. advised of second voyage of "Tampico".

The appellee asserts as to the case made by the cross libel that estoppel cannot be used as a basis of affirmative relief and cites *Dickerson v. Colgrove*, 100 U. S. 578, where the court said that estoppel 'is available only for protection, and cannot be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit.' That was an action of ejectment. The defense was based upon equitable estoppel and was held sufficient, the court ruling that the action involved both the right of possession and the right of property, and as the facts indicated that the plaintiff was not in equity and conscience entitled to disturb the possession of the defendants, the latter might rely upon the doctrine of equitable estoppel to protect their possession. *In the present case estoppel is not made the basis of the relief sought by the cross libel. The relief sought is based only upon the terms of the contract between the appellant and the appellee, and estoppel is asserted only as against the defense which the appellee pleaded thereto, and we see no reason why it is not available for that purpose.*

Breach of contract and not estoppel is basis of *Sudden & Christenson's* damage.

Crossett Western Lumber Co. is estopped to defend damages.

It is contended that there can be no estoppel in cases where, as here, the representations were made without fraudulent intent. But the rule is well established that it is not necessary that the representations shall have been made with such an intent. It is sufficient if they are 'of such a character as to induce a reasonable and prudent man to believe that they were intended to be acted on.' 21 C. J. 1121; 10 R. C. L. 691.

Contract between Sudden & Christenson and W. R. Grace & Co. has been admitted by Crossett Western Lumber Co.

*One of the defenses asserted by the appellee to the damages claimed upon the cross libel is the fact that the appellant sub-let the Tampico to W. R. Grace & Company without the consent of the appellee, the charter between the appellant and the appellee having provided 'Charterers to have the option of subletting the steamer provided consent of owners obtained', and Mitchell the manager of the appellee having testified that the appellee never consented to any sub-charter. To this it is to be said that it does not appear from anything in the record that the appellant did in fact sub-charter the vessel to W. R. Grace & Company, or that it entered into any agreement with that company other than a contract of affreightment. It appears also that the letter of the appellant to the appellee of December 20, 1915, advised the appellee that the appellant proposed to use the Tampico in performing its obligation to W. R. Grace & Company and that no objection was made by the appellee.*

Sudden & Christenson entered into only a contract of affreightment with W. R. Grace & Co.

Crossett-Western Lumber Co. was advised of the intended second voyage of the Tampico and did not object thereto.

The record presents the question of the rights and obligations between the appellant and the appellee from and after the time when the former received on January 11, 1916 notice that the Pacific Coast Steamship Company demanded possession of the vessel on or before May 15, under the rights which were reserved to it in the original charter. We think that from and after that date the appellant had no



right to enter into contracts for the use of the Tampico in reliance upon the appellee's said representations. The vessel was then on her way home from her first voyage. She was not sent out upon the second voyage until February 22, 1916. What the contractual relations were between the appellant and W. R. Grace & Company on *January 11* does not appear from the record. It is not shown that there was *then* a binding contract between them. The appellant's testimony that *at that time* the vessel was fixed for the second voyage may mean only a fixed intention in the minds of the appellants to use the vessel for a second voyage. The appellant's defense to the original libel and its claim for damages in the cross libel rest upon estoppel, and to establish estoppel it must show that relying upon the representations of the appellee, it changed its position to its injury. 'The whole office of an equitable estoppel is to protect one from a loss which but for the estoppel he could not escape.' 10 *R. C. L.* 698.

This Court's inquiry does not question the fact that Sudden & Christenson had entered into a contract with W. R. Grace & Co., but merely requires that it be shown that such contract existed prior to January 11, 1916, which it did.

We think the decree of the court below should be reversed, and the cause remanded to that court with instructions to ascertain and adjudge the amount, if any, to be awarded to the appellee upon the issues created by the libel and the answer thereto and the damages, if any, to be awarded to the appellant under the issues arising upon the cross libel, and to enter a decree accordingly. The parties to have permission to take further testimony upon the issues so to be determined. It is so ordered."

In view of the above quoted decision of this Court, it appears that the case was sent back to the District Court to ascertain and adjudge damages to be awarded to the parties upon the issues created by the libel and cross libel, and the answers thereto, *in view of any contractual relations that had been*

*entered into by the appellee herein and W. R. Grace & Co. ON OR PRIOR TO JANUARY 11, 1916.* All questions of liability have been definitely and finally determined by this Court and are *res adjudicata*.

In deciding the question of liability this Court has held: *First*: That appellant has been guilty of a breach of contract in demanding the return of the "*Tampico*" prior to May 15, 1916, and the delivery of the vessel on the Pacific Coast rather than on the Atlantic Coast, and: *Second*: That appellant is estopped by its conduct from defending the damages claimed by appellee. The sole inquiry of this Court, and the only purpose for which it was remanded, was to ascertain whether or not the contractual relations between the appellee and W. R. Grace & Co. existed on or prior to January 11, 1916, *and then* to assess the damages. There was no question in the mind of the Court as to the damages, but only as to whether or not those damages accrued to appellee pursuant to a contractual obligation entered into *on or prior to January 11, 1916*, and that is the only purpose for which the case was remanded.

The term of the charter party between the appellant and the appellee was fixed only by the time to be consumed in the stipulated voyage and the optional second voyage. Appellant is guilty of a very strained and incorrect construction of the opinion of this Court when it says that this Court has held that:

"Notwithstanding the terms of the charter party, the Crossett Western Lumber Company,

by failing to mention the anticipation privilege, was estopped thereby from declaring a termination of the sub-charter prior to the 15th day of June, 1916, if, relying on this incorrect statement, Sudden & Christenson entered into a new contract" (Appellant's Brief, p. 4).

for this Court has held in final judgment on this question that:

"The relief sought is based only upon the terms of the contract between the appellant and the appellee,"

and thus that the representations made by the appellant with reference to the redelivery date of the "*Tampico*" were part of the contract between the parties.

On page 4 of its brief, the appellant recites that on January 10, 1916 it notified the appellee that under no circumstances would it allow the "*Tampico*" to go to the Atlantic Coast, and that it *thereafter* adhered to that position, and that appellee, notwithstanding this notification, thereafter began the second voyage to load a cargo of nitrate for W. R. Grace & Co. from South America to the Atlantic Coast.

The charter party provides for a voyage and optional second voyage *to the Atlantic Coast, and for redelivery on the Atlantic Coast* (First Apostles, pages 10, 11). The appellant has admitted these facts in its pleadings and briefs.

As noted by the Court in its opinion, the appellee notified the appellant on December 20, 1915, that it intended to use the "*Tampico*" for a second voyage in performance of its obligation to W. R. Grace

& Co., substituting the "*Tampico*" for the Steamer "*Eureka*" (First Apostles, pages 61-62). The appellant was fully advised as to appellee's obligations on the "*Eureka*" (this vessel being then on the *Atlantic Coast*) because it had likewise sub-chartered the "*Eureka*" to the appellee.

Mr. Mitchell, appellant's manager, testifies that certain telegrams were sent "before the consent of the Pacific Coast Steamship Company was received for the second voyage" (First Apostles, page 46). Evidently, even the owner of the vessel consented to the second voyage of the "*Tampico*"; and of course it could have done so only through the appellant.

On January 3, 1916, the appellant inquired of the appellee as to what trip the appellee proposed to make with the "*Tampico*" on her second voyage (First Apostles, page 157) and did not suggest any objection to a voyage to the Atlantic Coast. On January 5, 1916, the appellee advised the appellant that if the Canal were open, the "*Tampico*" would proceed to the Atlantic Coast on her second voyage (First Apostles, page 158).

Commencing, then, with December 20, 1915, the appellant was fully advised that the second voyage of the "*Tampico*" would be for W. R. Grace & Co. to the Atlantic Coast. No objection of any kind was made to this proposed voyage up to and including December 31, 1915, when the appellee exercised its option for the second voyage *to the Atlantic Coast*, nor thereafter until January 10,



1916, when the appellant, *for the first time*, notified the appellee that the "*Tampico*" would not be permitted to go to the Atlantic Coast. This was *after* redelivery on May 15, 1916 had been demanded by the Pacific Coast Steamship Company, and *after* the appellee, relying upon the representations theretofore made by the appellant, had entered into its contract with W. R. Grace & Co. for a voyage to the Atlantic Coast. It is apparent that the reason for appellant's notification that the vessel would not be permitted to go to the Atlantic Coast was because demand for redelivery of the vessel on the Pacific Coast by May 15, 1916 had already been made by the Pacific Coast Steamship Co. on *January 7, 1916*. It is equally apparent that the reason that the appellee sent the "*Tampico*" on her second voyage was because it had become bound to do so under its contract of January 4, 1916, with W. R. Grace & Co.

Prior to the events above noted the appellee had contracted with W. R. Grace & Co. to carry a cargo of nitrate on the S. S. "*Eureka*" (which had likewise been sub-chartered by the appellant to the appellee) from the West Coast of South America through the Panama Canal to New York. On account of the closing of the Canal the "*Eureka*" was not available for that purpose and was excused from performance of the voyage. As early as October 4, 1915, the appellee inquired of the appellant whether or not the "*Tampico*" could be substituted for the "*Eureka*" (First Apostles, page



181). The charter party between the appellant and the appellee on the "*Tampico*" was executed under date of October 18, 1915, and *under the same date* the appellant and the appellee executed a mutual release and cancellation of their sub-charter on the "*Eureka*" (First Apostles, page 176). From thence onward the "*Eureka*" was no longer available to appellee.

It is plainly apparent that these transactions were carried through by both parties with the idea that the "*Tampico*" was to be substituted for the "*Eureka*", and that idea, several times expressed between December 20, 1915 and January 10, 1916, obtained down to the time when the Pacific Coast Steamship Company notified the appellant that it would require redelivery of the vessel on the Pacific Coast by May 15, 1916. In the interim the appellee, relying upon the representations of the appellant, had contracted with W. R. Grace & Co. for the second voyage of the "*Tampico*".

On January 4, 1916, the appellee, through its agents at New York, confirmed its agreement with W. R. Grace & Co. for the second voyage of the "*Tampico*" (see letter, Appellant's Brief, pages 5, 6). To this letter was attached, for reference, the agreement between appellee and W. R. Grace & Co. on the "*Eureka*". January 4, 1916 fell on a Tuesday. On the preceding Friday, December 31, 1915, the appellee, relying on the representations of the appellant, had exercised its option for the second voyage. Appellee, having thus established

its right to the use of the steamer for the second voyage, forthwith entered into its contract with W. R. Grace & Co. to carry a cargo of nitrates from the West Coast of South America through the Canal to the East Coast of the United States. This is conclusive evidence that the New York agents of the appellee acted only pursuant to appellee's instructions in this particular given *after* appellee had exercised its option in reliance on the representations of appellant and was assured of its right to undertake the second voyage of the vessel. The appellee, in exercising its option for the second voyage, naturally undertook the continuance of the responsibilities stipulated in the charter party, and, in entering into its contract with W. R. Grace & Co., engaged, unless the Canal was closed at the time the "*Tampico*" was ready to leave her loading port, to carry a cargo of nitrates on the "*Tampico*" from the West Coast of South America through the Canal to the Atlantic Coast of the United States. It is the admitted and conceded fact that the Canal was open at the stipulated time (April 15, 1916) (Stipulation of Facts, First Apostles, page 195) and the appellee was bound by its contract to complete the voyage agreed upon. The contract between the appellee and W. R. Grace & Co. created a new obligation. The "*Eureka*" was not available for the voyage, the sub-charter between the appellant and the appellee on that vessel having been cancelled on October 18, 1915, the same day that the sub-charter on the "*Tampico*" was entered into

between the same parties. The appellant desired to make redelivery of the "*Eureka*" on May 15, 1916 (letter from appellant to appellee, dated December 27, 1915, First Apostles, pages 58, 59). The Canal was closed at the time the appellee entered into its contract with W. R. Grace & Co. for the "*Tampico*". Through the closing of the Canal appellee was excused from the performance of its obligation to W. R. Grace & Co. on the "*Eureka*". The contract for this vessel between appellee and W. R. Grace & Co. stipuated that the intended voyage should be "via Panama Canal". The "*Eureka*" was on the Atlantic Coast and could not even proceed to her loading port on the West Coast of South America. The usual exception clause, appearing in the contract, excused the vessel as the closing of the Canal made the proposed voyage impossible. In addition, W. R. Grace & Co. had the right to cancel the agreement if the vessel should "not be ready to load at loading port on or before 6 o'clock p. m. on the 15th of January" (see Christenson's Exhibit 1). This, on account of the closing of the Canal, was an impossibility.

We have heretofore referred to the fact that all questions of liability in this case have already been decided by this Court in favor of the appellee upon the grounds that appellee is entitled to relief under the terms of its contract with the appellant, which included the representations as to redelivery date made by the appellant. This Court *has not said*, as stated by appellant on page 7 of its brief, that if

Sudden & Christenson, relying upon the representations of appellant, proceeded to "sub-charter" the vessel to W. R. Grace & Co., that appellant was thereby estopped from thereafter claiming a return of the vessel at an earlier date. This Court has specifically held that appellee *did* rely on the representations of appellant, for it has said that:

"The representation was made with the intention that it should be acted upon. It was a representation such as to induce a reasonable and prudent man to believe that it was intended to be acted upon, and the appellant" (Sudden & Christenson) "*in acting upon it*, exercised such reasonable diligence as the circumstances required."

This Court *has not*, as stated on page 8 of appellant's brief, referred this cause back to the District Court to ascertain what was the contractual relationship between *Sudden & Christenson and Cressett Western Lumber Company*. This Court has definitely decided upon the contractual relationship between appellant and appellee, it has definitely found that there was a "contract of affreightment" between appellee *and W. R. Grace & Co.*, and remanded the case to the District Court for the sole purpose of finding whether the contractual relationship between appellee and W. R. Grace & Co. existed *on or prior to January 11, 1916*, and then, if such contractual relationship existed *on or prior to said time*, to assess the damages. This Court has merely said that it did not appear from the record before it on the first appeal what were the con-



tractual relations between appellee and W. R. Grace & Co. *on January 11, 1916*; that the said record did not show that there was *then* a binding contract between them and that appellee's testimony that *at that time* the vessel was fixed for a second voyage might have meant only a fixed intention in the minds of appellees to use the vessel for a second voyage. This Court has *never* found that the contractual relations of appellee and W. R. Grace & Co. have not been shown; it has *never* found that a binding contract between these parties for the second voyage of the "*Tampico*" did not exist, but it has only said that it did not appear if these facts were true *on January 11, 1916*. It was not *the fact* of the contract but *the time* at which the contract was made to which the inquiry of this Court was addressed. Pursuant to the remanding of the case, evidence has been adduced to show conclusively, and the District Court has found, that the appellee, relying on the representations and contractual undertakings of appellant, entered into its contract with W. R. Grace & Co. for the second voyage of the "*Tampico*", *on January 4, 1916* and that (as conceded by appellant) the Canal was open on the day the "*Tampico*" was ready to sail from its loading port. These findings are not disputed by appellant *and they are the only findings from which an appeal may be prosecuted*. All other issues of the case have already been decided by this Court. Pursuant to its said findings the District Court has decided that the appellant is entitled to its unpaid



charter hire and the appellee is entitled to its damages, leaving a net sum of \$8799.96, with interest, due to the appellee.

With the record before it, and which is now before this Court, the District Court could not have done otherwise.

On pages 8 and 9 of its brief, appellant sets forth certain questions which it says are to be determined on this appeal within the rulings of this Court on the prior appeal. These questions, however, are *not* to be determined on this appeal, and are *not* within the rulings of this Court on the prior appeal.

*First:* This Court has held that the appellee entered into a new contract with W. R. Grace & Co. relying upon the representations of appellant; and the record supports such holding.

*Second:* This Court did *not* hold on the prior appeal that there was no evidence before it upon which it could award damages against appellant, and *did not* remand the case in order that such evidence might be supplied. This Court remanded the case for the sole purpose of ascertaining *the time* at which appellee entered into its contract with W. R. Grace & Co. and directed the Court to assess the damages if such time was prior to January 11, 1916. The evidence produced on the second trial has satisfied this sole prerequisite of this Court and pursuant thereto the District Court has found that such time was on January 4, 1916, (and this fact is not disputed) and has assessed the damages accordingly.

*Third:* The record shows, and it has never been disputed by appellant, either in the first trial of this case before the District Court, in its brief submitted thereon, on the first appeal of this case, or its brief submitted thereon, or on the second trial of this case in the District Court, but that the damages claimed by appellee were advanced upon a proper basis and in a proper amount, and the record shows that appellee is properly entitled to said damages.

*Fourth:* This Court has held and the record shows that appellee is claiming damages arising out of a breach of contract on the part of the appellant. This Court has found that the "*Tampico*" was not "sub-chartered" for her second voyage, but that appellee entered into a "contract of affreightment" with W. R. Grace & Co. In addition, both the Pacific Coast Steamship Co., the owner of the "*Tampico*", and appellant, consented to the second voyage of the vessel.

*Fifth:* The breach of contract on the part of appellant occurred when appellant unlawfully terminated the second voyage of the "*Tampico*", and the so-called doctrine of "anticipatory breach" of contract does not apply, and appellee did not enhance its damages, but minimized them. Appellee undertook a voyage that it had a right to undertake and had bound itself to undertake *both under the terms of its charter party with appellant, and its contract of affreightment with W. R. Grace & Co.*

*Sixth:* Appellee is entitled to the full amount of damages claimed by it and awarded to it by the District Court.

The questions enumerated by appellant are not, therefore, presented on this appeal within the rulings of this Court on the prior appeal. The sole and only question that can be presented on this appeal, and that has not already been adjudicated by this Court, is: *Had appellee entered into its contract with W. R. Grace & Co. prior to January 11, 1916;* and that fact is not even disputed by the appellant.

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### Argument.

**THE QUESTION OF ESTOPPEL IS NOT INVOLVED IN THIS APPEAL. APPELLEE IS ENTITLED TO ITS DAMAGES UNDER THE JUDGMENT OF THIS COURT.**

The language of this Court, quoted on page 10 of appellant's brief, was used by the Court only with reference to the question of whether or not appellee had entered into its contract of affreightment with W. R. Grace & Co., *on or prior to January 11, 1916*. This is evidenced by the fact that the quoted language immediately follows this statement by the Court:

“What the contractual relations were between the appellant and W. R. Grace & Co. *on January 11* does not appear from the record. It is not shown that there was *then* a binding contract between them. The appellant's “(Sudden & Christenson)” testimony that *at that time* the vessel was fixed for the second voyage

may mean only a fixed intention in the minds of the appellants to use the vessel for a second voyage.”

It is apparent that the sole inquiry of this Court was addressed to *the time* of the contract between appellee and W. R. Grace & Co. with reference to the date of January 11, 1916 as the Court quite properly held that appellee would not be entitled to damages if it had not entered into its contract with W. R. Grace & Co. prior to the time (January 11, 1916) that it was notified that the redelivery date of the “*Tampico*” was May 15, 1916. As we have heretofore noted, there is no contention but that the contract between appellee and W. R. Grace & Co. was entered into on January 4, 1916.

The theory upon which the case was decided by this Court in favor of the appellee is evidenced by the following language:

“In the present case, estoppel is *not* made the basis of the relief sought by the cross libel. The relief sought is based *only upon the terms of the contract between appellant*” (Sudden & Christenson) “*and the appellee*” (Crossett Western Lumber Co.) “*and estoppel is asserted only as against the defense which the appellee*” (Crossett Western Lumber Co.) “*pleaded thereto, and we see no reason why it is not available for that purpose.*”

There is no force or effect in the far-fetched attempt of appellant to show that the act of the appellee in entering into its contract with W. R. Grace & Co., through its New York agents, was not committed relying upon the representations of ap-



pellant. The record stands without contradiction that the New York agents of appellee, D. B. Dearborn & Co., entered into this contract as the agents of appellee, and that the contract was that of the appellee and none other. When we take into consideration the heretofore noted fact that, acting upon the representations of the appellant, the appellee on Friday, December 31, 1915, exercised its option for the second voyage; and that on Tuesday, January 4, 1916, through its New York agents, D. B. Dearborn & Co., it entered into its contract with W. R. Grace & Co., it is quite evident that the latter act naturally and proximately followed the former. In the interim on January 3, 1916, the appellant has acknowledged receipt of appellee's notice of the exercise of the option without objection as to *any* voyage to be undertaken. It is elementary that notice to an agent within the limits of his authority is notice to the principal, and it naturally follows, and is equally elementary, that the acts, intentions and knowledge of an agent within the limits of his authority are the acts, intentions and knowledge of the principal. There can be no separation of these matters between principal and agent. There is not one word in the record which even indicates any separation in act, knowledge or intention between the appellee and its New York agents, D. B. Dearborn & Co.

It is uncontradicted, and indeed testimony is cited in this behalf on page 12 of appellant's brief, that D. B. Dearborn & Co., *as the agents of appellee*,



had for some time been conducting negotiations with W. R. Grace & Co. for the second voyage of the "*Tampico*". If, as contended by appellant, the *agents* did not rely on the representations made to the *principal*, why then were not these negotiations consummated prior to or longer after the date that appellee exercised its option with appellant for the second voyage? It is extremely significant that these negotiations were not consummated until immediately after appellee had fixed its right to use the "*Tampico*" for a second voyage by exercising its option with appellant, and *then, and immediately thereafter*, through its New York agents, consummated its pending negotiations with W. R. Grace & Co. Throughout the record, without contradiction, it appears that it was Sudden & Christenson, and not D. B. Dearborn & Co., that contracted with W. R. Grace & Co., and it is now for the first time that appellant, in a vain attempt to avoid and defeat the effect of the decree of this Court, vainly seeks to show otherwise. *Prima facie*, ostensibly and actually, the record shows, *without any contradiction by appellant*, that *appellee, itself, and none other*, relying itself upon the representations of appellant, first exercised its option for a second voyage on Friday, December 31, 1915, and then consummated its negotiations with W. R. Grace & Co. on January 4, 1916.

In fact this Court has already determined these questions. It has held that on or about December 20, 1915, *Sudden & Christenson* "were negotiating

with W. R. Grace & Co. for the use of the '*Tam-pico*' for a second voyage"; that on December 27, 1915 Crossett Western Lumber Co. wrote to Sudden & Christenson that its charter of the "*Tam-pico*" from the owner "reads practically the same as that of the '*Eureka*' except that we are to make redelivery about June 15" and that the letter closed with the request that on receipt thereof the appellant (Sudden & Christenson) advise the appellee (Crossett Western Lumber Co.) of its position as to the option; that "upon receipt of that letter the appellant" (Sudden & Christenson), "closed its negotiations with W. R. Grace & Co. and fixed the vessel for the second voyage", and in so "*acting*" upon the representations of appellant, "exercised such reasonable diligence as the circumstances required."

This Court has therefore held, *upon the same record as to these facts that is now presented*, that the negotiations for the contract with W. R. Grace & Co., and the contract itself, and all intent and knowledge in connection therewith, were the acts, intent and knowledge of appellee in its own behalf, and that, as to the representation of appellant, *Sudden & Christenson*, "*\* \* \* in acting upon it, exercised such reasonable diligence as the circumstances required.*" These facts are made all the more certain by the testimony of Mr. Cahill taken on the second trial of the case:

"Q. Prior to December 20, 1915 were *Sudden & Christenson* negotiating in any way with

W. R. Grace & Co. with reference to the '*Tampico*'?

A. Yes, sir.

Q. What were these negotiations?

A. Those negotiations were for the freighting of the cargo of nitrates from the West Coast of South America to the East Coast of the United States.

Q. On what vessel?

A. That was on the Steamer '*Tampico*.'"  
(Second Apostles p. 11.)

"Q. Mr. Cahill, what, if anything, did *you* do, and when, after the receipt of the letter dated January 3, 1916, that you have referred to, with reference to engaging the '*Tampico*' to W. R. Grace & Co.?

A. *We* immediately, I think possibly the following day, made a contract with W. R. Grace & Co. to move a cargo of nitrate from the West Coast of South America to the East Coast of the United States, via the '*Tampico*'.

Q. What form did that agreement take?

A. That was *confirmed* by a letter from *our agents* in New York, Messrs. D. B. Dearborn & Co., to W. R. Grace & Co."

Without question, therefore, the record shows and this Court has found that the contract between appellees and W. R. Grace & Co. was entered into in reliance upon the representations and contractual undertakings of appellant.

Appellant is going far off the record when it states that the entering into of the contract between appellee and W. R. Grace & Co. did not involve the assumption by the appellee of a new obligation or an altering of its position to its detriment. There is no evidence in the record to that effect. There is nothing of record to show that appellee

was already, or otherwise, bound to W. R. Grace & Co. so as to be liable in damages if it failed to move the cargo of nitrates ex the "*Eureka*". As a matter of fact all right to the use of the "*Eureka*" had been relinquished by appellee in the cancelation of the sub-charter on the "*Eureka*" entered into by appellant and appellee on October 18, 1915 (First Apostles, p. 176), the same day that the sub-charter on the "*Tampico*" was entered into between the same parties. Under the terms of its contract with W. R. Grace & Co., for the "*Eureka*", the appellee was excused from performance by the closing of the canal.

As heretofore pointed out, this contract of affreightment between appellee and W. R. Grace & Co. provided for a voyage "via Panama Canal". Freight was stipulated at \$9 per ton. The contract contained the usual mutual exception clause under which the act of God, earthquakes, inundation, perils of the sea, arrest and restraint of princes, rulers and people, etc., from the signing of the charter party to the conclusion of the voyage, were always mutually excepted.

It was further provided that

"should the steamer not be ready to load at loading port on or before 6 o'clock P. M. on the 15th January, charterer's agents to have the option of cancelling this charter party."

The "*Eureka*" was on the Atlantic Coast and could not even proceed to her loading port on account of the fact that the canal was not open.



Whether this fact was due to an act of God, or a restraint of princes, rulers or people, it comes within the exception clause in the contract between appellee and W. R. Grace & Co. and, as such, not only entitled W. R. Grace & Co. to cancel the charter party on account of the vessel not being able to load by January 15, 1916, which was, of course, an impossibility (the fact that the ship is prevented from arriving at the loading port by an excepted peril does not deprive the charterer of the right to cancel; *Karran v. Peabody*, 145 Fed. 166; *Smith v. Dart*, L. R. 14; Q. B. D. 105) but excused the appellee from carrying out its engagement with the vessel.

When an English ship chartered for "one Baltic round" was in the Baltic at the outbreak of the European War, with the result that redelivery became impossible until the end of the war, it was held that this put an end to the charter. *Scottish Nav. Co. v. Souter*, L. R. (1917) 1 K. B. 222; 22 Com. Cas. 154.

In the case of *Atlantic Fruit Co. v. Solari*, 238 Fed. 217, it was held that where a Dutch ship under a time charter was ordered by the Dutch Government not to continue in the service of the charterers that the charter was frustrated.

"Apart from any question of breach of contract, and under a different principle, circumstances which delay its performance may destroy the rights or obligations of both parties to the contract in a charter party or in a bill of lading. This, in regard to charter parties, is



commonly referred to under the phrase 'frustration of the commercial purpose of the adventure', but is really a particular application of the same general principle that a contract, which by supervening and unforeseen circumstances, becomes impossible of performance, may cease to bind either party to it.

"The contract may be put to an end in this way whether it is still executory or has been in part already performed." *Scrutton on Charter Parties*, 10th Ed. p. 102, and cases cited.

The frustration of the adventure excuses both parties to the contract, and the shipowner, as well as charterer, may in such event decline to perform his contract. The reasons for allowing the contract to be dissolved under the new conditions apply to both parties.

*Jackson v. Union Marine Ins. Co.* (1873)

L. R. 8 C. P. p. 578; (1874) L. R. 10 C. P. p. 144.

On account of the closing of the canal, therefore, the voyage contracted for by appellee and W. R. Grace & Co. on the "*Eureka*" was abrogated, and both parties were excused from performance, for it was impossible for the vessel to perform her stipulated voyage "via Panama Canal". The "*Eureka*" was on the Atlantic Coast and the "*Tampico*" was on the Pacific Coast. The appellee entered into negotiations with W. R. Grace & Co. to carry the proposed cargo from the West Coast of South America to the East Coast of the United States on the "*Tampico*". It also entered into ne-

gotiations with the appellant for the use of the "*Tampico*" for that purpose. These negotiations between appellant and appellee were consummated on October 18, 1915, when the sub-charter on the "*Eureka*" was cancelled and the sub-charter on the "*Tampico*" was entered into. The negotiations between appellee and W. R. Grace & Co., however, were consummated on January 4, 1916, when appellee, relying upon the representations of appellant, had exercised its option for the second voyage of the "*Tampico*" for W. R. Grace & Co. from the West Coast of South America through the Canal to the East Coast of the United States.

A different freight rate, dependent upon different contingencies, and a different voyage, also dependent upon different contingencies, were undertaken by appellee under its contract with W. R. Grace & Co. on the "*Tampico*" than had been undertaken in its contract with the same company on the "*Eureka*".

The very exercise by appellee of its option for the second voyage, with the consequent continuation of its obligations under its charter party with appellant, and its act in agreeing to transport the cargo of nitrates for W. R. Grace & Co. from the West Coast of South America to the East Coast of the United States, which acts are inseparable and followed one from the other, is a decided alteration in its position, made in reliance upon the representations of appellant.

No matter what the contractual obligations of appellee were with W. R. Grace & Co. on the "*Eureka*", it is apparent that this vessel could not be used for the stipulated voyage, and that, on one hand, the appellee was excused from performance on account of the impossibility thereof under the terms of its contract, and that W. R. Grace & Co., for the same reason, was likewise excused; and, on the other hand, that under the terms of the contract W. R. Grace & Co. had the right to the cancellation of the agreement on account of the failure of the vessel to proceed to her loading port on the West Coast of South America by January 15, 1916. If, then, even in compromise of that situation, the appellee entered into its second contract with W. R. Grace & Co. for the use of the "*Tampico*" on her second voyage, it is undoubtedly true that appellee altered its position and assumed responsibilities and liabilities to its injury, in reliance upon the representations of appellant that the "*Tampico*" would be available for the agreed upon voyage.

This is very much more than sufficient for it is the rule that to constitute an estoppel it is not necessary that the party seeking to avail himself of the estoppel should have been induced to enter into a contract legally binding. It is sufficient if he has been induced by the words or conduct of the other party to act upon the belief that a certain thing was true and that he would be prejudiced if the other party were allowed to assert the contrary.

*Lawson v. Biller*, 88 Ky. 599; 11 S. W. 602.

Looking at the situation from another viewpoint it is equally apparent, in view of the representations made *by appellee to appellant* that the second voyage of the "*Tampico*" would be for W. R. Grace & Co. to the Atlantic Coast and the exercise, by appellee, of its option for that second voyage, that *appellee was bound to appellant* to complete that voyage. *Appellant* would have had the right to rely upon such undertaking on the part of appellee and to make its arrangements accordingly and could have held appellee responsible if it had thereafter changed its mind (as appellant has attempted to do) and had sought to deviate from its agreement to the detriment of appellant after the rights of the parties had been fixed by the exercise of the option for the second voyage. The rule established by the facts must, of necessity, work both ways. There can be no contradiction of the plainly evident fact that appellee in entering into its contract with W. R. Grace & Co. in reliance upon the representations and contractual undertakings of appellant, altered its position to its injury.

This question as to the alteration of appellee's position is, however, not pertinent on this appeal, for, as we have heretofore stated, this Court has held that the appellee *did* contract with W. R. Grace & Co. in reliance upon appellant's representation and contractual undertakings and has held that the only question or contingency upon which appellee's right to damages depends was whether or not the contract of affreightment between ap-



pellee and W. R. Grace & Co. had been entered into on or prior to January 11, 1916.

In the opinion of this Court on the prior appeal, the only thing lacking in the record was *the time* of the entering into of the contract of affreightment between appellee and W. R. Grace & Co. and the present record shows, and the District Court has found, and properly so, and there is no contradiction of the fact, that this contract was entered into on January 4, 1916, prior to the time mentioned by this Court, to-wit, January 11, 1916.

The case of *United States v. 422 Cases of Wine*, 1 Pet. 547; 7 L. Ed. 257, cited on page 16 of appellant's brief, is pertinent therefore, *not* in support of any contention that appellant has advanced, but in support of our contention that this Court will not again consider, and that there is not open on this appeal, the various questions that we have referred to as having been definitely finally and conclusively determined by this Court.

This Court, as we have heretofore stated and reiterated, only made inquiry as to the time of the contract between appellee and W. R. Grace & Co. This has been supplied on the second trial of the case, and for that reason the case of *Westfall v. Wait*, 165 Ind. 353, cited on pages 16 and 17 of appellant's brief, does not apply, and the same is true of *Standard Sewing Machine Co. v. Leslie's*, 118 Fed. 557, and *King v. Lagrange*, 61 Cal. 231.

On page 17 of its brief, appellant assumes, and assumes properly, that it is responsible in damages



for its breach of contract, although it states it in a little different language, pursuant to its endeavor to put a strained and incorrect construction upon the decree of this Court. It then inquires whether or not the agreement that appellee made with W. R. Grace & Co., relying upon the representations of appellant, was one that it had a right to make.

Again we find that this Court, *with the same record before it as to these facts*, has said:

“One of the defenses asserted by the appellee” (Crossett Western Lumber Co.) “to the damages claimed upon the cross libel is the fact that the appellant (Sudden & Christenson) sublet the ‘*Tampico*’ to W. R. Grace & Co. without the consent of the appellee” (Crossett Western Lumber Co.), “the charter between the appellant and appellee having provided ‘charterers to have the option of subletting the steamer provided consent of owners obtained’ and Mitchell, the manager of the appellee” (Crossett Western Lumber Co.) “having testified that the appellee” (Crossett Western Lumber Co.) “never consented to any subcharter. To this it is to be said *that it does not appear from anything in the record that the appellant*” (Sudden & Christenson) “*did in fact subcharter the vessel to W. R. Grace & Co., or that it entered into any agreement with that company other than a contract of affreightment.* It appears also that the letter of the appellant” (Sudden & Christenson) “to the appellee” (Crossett Western Lumber Co.) “of December 20, 1915, advised the appellee” (Crossett Western Lumber Co.) “that the appellant” (Sudden & Christenson) “proposed to use the ‘*Tampico*’ in performing its obligation to W. R. Grace & Co., *and that no objection was made by the appellee*” (Crossett Western Lumber Co.).

The same record now before this Court, of course equally fails to show that appellee did in fact "sub-charter" the vessel to W. R. Grace & Co. or that it entered into any agreement with that company other than a "contract of affreightment".

We have already called the attention of the Court to the fact that from or prior to December 20, 1915, down to the time when the Pacific Coast Steamship Co. demanded redelivery of the "*Tampico*" on May 15, 1916, the appellant knew and did not object to the fact that this vessel was to be used for carrying a cargo of nitrate for W. R. Grace & Co. from the West Coast of South America to the East Coast of the United States, and *was to be substituted for the "Eureka"*. Its present contention in this particular is a repudiation of its obligations similar to its former contention on the first appeal that it was not bound by its representations and agreements. The Pacific Coast Steamship Co. itself, the owner of the "*Tampico*", consented to the second voyage of the "*Tampico*" (First Apostles, page 46). That consent must have been effected through the appellant.

Mr. Mitchell himself admits that the appellant consented to the "sub-charter" of the "*Tampico*" by the appellee, and then when prompted by counsel seeks to withdraw that admission.

"Mr. MONTGOMERY. I will withdraw that question and ask: Q. What are the facts with reference to whether or not the Crossett Western Lumber Co. ever consented to a sub-chartering of the Steamship '*Tampico*' by Sud-

den & Christenson, the cross libelant in this controversy?

A. Under the conditions that they would return the ship to Pacific Coast ports, not via the Atlantic Coast ports.

Mr. MONTGOMERY. Repeat the question. The answer is not responsive. (Note: We submit that it was decidedly responsive.) (The last question was thereupon read.)

A. We never consented to any sub-charter.”  
(First Apostles, p. 53.)

Appellant thus seeks to qualify its permission to “sub-charter” the “*Tampico*” as it has attempted to qualify its consent and agreement under the charter party that the vessel proceed to and be re-delivered at an Atlantic Coast port, and as it has endeavored, and now endeavors, to qualify all of its acts and contractual breaches that have caused the damage to appellee. Its entire course of action throughout this controversy has been one of violation of contractual obligation with attempted qualification thereof as an afterthought. It has not so far succeeded in qualifying its obligations or the result of its breaches of contract, and we feel sure that it will not now be permitted to succeed in its attempt to qualify the decree of this Court.

The law is elementary on this point. The record clearly shows a consent and an agreement under the charter party on the part of appellant that the vessel be employed as it *was* employed on its second voyage. Even without that consent and agreement, the mere silence of the appellant, when it was its

duty to object to the proposed second voyage, would render it responsible in damages to the appellee and estop it from seeking to avoid the consequences arising from that silence.

Where a person, knowing the facts, remains silent when he ought to speak and make known the truth, and where his silence is calculated to prove misleading and disastrous to an innocent party who acts in good faith upon the appearance of the situation, assuming the silence of the other party to be in conformity with the facts, equity and good conscience will estop the party who remains silent from thereafter asserting the real facts when to do so would work a fraud upon such innocent party.

*Farber v. Page & Mott Lumber Co.*, 20 Idaho 354; 118 Pac. 664.

In the case of *Douglas & Varnum v. Morrisville*, 84 Vt. 302; 79 A. 391, it was held that if one party to a contract knowingly leads the other, even by silence, to believe that when he executes the agreement that a certain construction will be put upon it, he is estopped thereby from gainsaying that construction to the prejudice of the other party.

In the case of *Flesner v. Cooper*, 162 P. 1112, the Court lays down the rule that the false representation, or concealment of facts, as an element of an equitable estoppel, may arise from silence of a party under imperative duty to speak.



The failure to speak when there is an opportunity so to do is often the strongest proof of waiver or estoppel.

*Pac. Commercial Co. v. Northwestern Fisheries Co.*, 197 P. 930.

It is not necessary, however, that the maintaining of silence, or failure to speak, must be intentional or deliberate in order to work an estoppel, for it was held in the case of *Kantor v. Cohn*, 164 N. Y. S. 383; 98 Misc. Rep. 355, that an estoppel by conduct arises as well where a party is silent, because of ignorance, and such ignorance amounts to negligence, to the injury of another, as when he has knowledge and is under a duty to speak and fails to do so.

This Court has already held, and indeed there is no question of the fact, that the appellant, not only had agreed to the second voyage of the "*Tampico*" but, with the knowledge or means of knowledge in its possession as to the time and place of the redelivery of the "*Tampico*" to its owner, nevertheless did not object to the second voyage of the vessel for W. R. Grace & Co. from the West Coast of South America to the East Coast of the United States. Under the authority of the cases above cited, this silence alone would work an estoppel against the appellant. The record shows, however, that, as heretofore noted, the appellant, and indeed the owner, had agreed and later consented to the second voyage of the "*Tampico*". It is plainly apparent, therefore, that the appellant cannot now



avoid the consequences of its agreement and consent that the "*Tampico*" be employed as it *was* employed on its second voyage, and that in any event its action in keeping silent, when it was advised of the intentions of the appellee with reference to the second voyage of the "*Tampico*", would prevent it from now claiming that the appellee violated its agreement in engaging the vessel to W. R. Grace & Co.

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IT IS THE FACT, AND THIS COURT HAS HELD WITH THE SAME EVIDENCE BEFORE IT AS TO THESE FACTS, THAT THE CONTRACT BETWEEN APPELLEE AND W. R. GRACE & CO. WAS MERELY A "CONTRACT OF AFFREIGHTMENT".

The contract between appellee and W. R. Grace & Co. is embodied in the letter of January 4, 1916 from appellee, through its agents, to W. R. Grace & Co. (Second Apostles, page 16). This letter consummates the then pending negotiations between the appellee and W. R. Grace & Co. and provides for the cargo, the voyage (dependent upon the conditions therein stipulated) and the freight rate (dependent also upon the contingencies therein stipulated). Reference is made to the substitution of the "*Tampico*" for the "*Eureka*" and the former agreement between the same parties is submitted with the letter *for reference* (Second Apostles, page 17). The terms of the contract between appellee and W. R. Grace & Co. are thereby completely stated and provided for. How, by any construction of the facts, can this contract be considered a sub-charter.

It is merely an engagement upon the part of the appellee to transport a cargo of nitrates for W. R. Grace & Co. from a designated loading port on the West Coast of South America, through the Canal, to a designated port of discharge on the East Coast of the United States at a stipulated rate of freight per ton. In the event that the Canal is closed at the time that the vessel is ready to leave her loading port, the voyage is to be to San Francisco at a less rate of freight. The Canal having been open at that time, the latter contingency never arose.

Appellant is guilty of a very strained construction of the facts when it seeks to employ from the use of language by laymen in entering into a contract on a printed "form" or in testifying as to *facts* that a legal relationship existed that did not in fact exist.

Appellant is just as far afield when it seeks to take advantage of the language of counsel in the stipulation appearing on page 10 of the second apostles, and on page 143 of the first apostles. This Court has failed to find and we fail to find anything in the record that would indicate a "sub-charter" of the "*Tampico*".

It must also be borne in mind that D. B. Dearborn & Co. were the agents of appellee for the "handling" of vessels as well as for the chartering of vessels, so that it can hardly be presumed, as appellant contends, that merely because the contract was closed by these agents of appellee the contract must have been a "charter".

It is therefore plainly apparent that the appellant not only did not object to, but had agreed and later consented to, the entering into of the contract between appellee and W. R. Grace & Co., and this Court has held, *with the same facts before it in this behalf*, that this contract was no more than a "contract of affreightment". Whether sub-charter or contract of affreightment, however, appellant cannot now, in the face of its representations, agreements and consent, repudiate its obligations to the detriment of appellee who, in good faith, has acted to its injury in reliance upon equal good faith on the part of appellant. This is *res adjudicata*.

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#### NON-APPLICATION OF THE SO-CALLED DOCTRINE OF "ANTICIPATORY BREACH."

On pages 20 to 23 of its brief, appellant seeks to apply to the facts of this case what it calls the doctrine of "anticipatory breach". This doctrine is one that so far as we have been able to ascertain has never been applied to a situation such as is involved in the case at bar. It is a doctrine that has been most frequently applied to insurance cases. Strictly speaking, a cause of action is the wrongful invasion of a private right, for which law or equity affords the injured person redress against the wrongdoer; and whether it be *ex contractu* or *ex delicto*, the cause cannot accrue until a wrong has been committed. *Sperry v. Cook*, 120 S. W. 654, 138 Mo. App. 296.

It has also been held that a person in mere anticipation that an actionable private nuisance may result from the operations of another, cannot maintain an action at law or in equity against such person in respect thereto. *Priewe v. Fitzsimmons & Connell Co.*, 117 Wis. 497, 94 N. W. 317.

In the case of *Alvey Ferguson Co. v. Ernst Tostetti Brewing Co.*, 178 Ill. App. 536, it was held that a mere notice of an intended breach of a contract is not of itself a breach, although it may become so *if accepted and acted upon as such by the other party*; yet, *if not so accepted and acted upon*, the notice remains only a matter of intention and may be withdrawn at any time before performance is in fact due.

In the case of *Provident Savings Life Assurance Society v. Ellinger*, 164 S. W. 1024, the rule is laid down that a contract can be breached in only one of three ways; by failure to perform, by positive declaration of and intention not to perform, *and acceptance by the other party*, and by inability to perform.

It is evident, therefore, that in attempting to apply this doctrine to the issues of the case at bar, appellant has overlooked the essential element that a notice of breach of contract, in order to itself constitute the breach, *must be accepted, treated as such, and acted upon by the other party*.

It is elementary that "a mere assertion that the party will be unable, or will refuse, to perform his



contract is not sufficient; it must be a distinct and unequivocal, absolute refusal to perform the promise *and must be treated and acted upon as such by the party to whom the promise was made.*" *Benjamin on Sales*, Sec. 568.

The above cited quotation from *Benjamin* is contained in the opinion in the case of *Rauer v. Harrell*, 32 Cal. App. 67. In further support of the same rule the Court in the case cited states the following rule from *6 Ruling Case Law*, page 1025:

"In order to justify the adverse party in treating the renunciation as a breach, the refusal to perform must be of the whole contract, or of a covenant going to the whole consideration, and must be distinct, unequivocal and absolute. \* \* \* It may be observed, however, that the renunciation itself does not *ipso facto* constitute a breach. *It is not a breach of the contract unless it is treated as such by the adverse party.*" Citing *Hansen v. Slaven*, 98 Cal. 377; *Bell v. Bank of California*, 153 Cal. 234.

The Court, in rendering its opinion in *Rauer v. Harrell*, further cites the rule laid down in *Smoot's case*, 15 Wall. 36, (21 L. Ed. 107) to the effect that the mere assertion that the party will be unable, or will refuse, to perform his contract is not sufficient to terminate it; it must be a distinct and unequivocal, absolute refusal to perform, treated and acted on as such by the promise.

This rule was approved in *Dingley v. Oler*, 117 U. S. 503; 29 L. Ed. 984.



As we have heretofore shown from December 20, 1915, and indeed prior thereto, down to January 10, 1916, appellant was advised as to the second proposed voyage of the "*Tampico*" and made no objection and, in fact, consented thereto. Relying on this course of conduct on the part of appellant, the appellee exercised its option for the second voyage and entered into a contract of affreightment with W. R. Grace & Co. on January 4, 1916. It was not until *after* the appellant had received notice from the Pacific Coast Steamship Co. that redelivery of the vessel would be required *on the Pacific Coast by May 15, 1916*, instead of on the Atlantic Coast by June 15, 1916, that on January 11, 1916, it endeavored to reverse its position and repudiate its contractual obligation with appellee.

Appellant contends that, merely because it wired to appellee on January 10, 1916 that "under no circumstances can we allow "*Tampico*" to go to Atlantic Coast" (Appellant's Brief, page 21), that, notwithstanding that appellee had at that time already bound itself to W. R. Grace & Co. to carry a cargo of nitrate from the West Coast of South America to the East Coast of the United States, the breach of contract between appellant and appellee occurred upon the sending of that wire, and that therefore the appellee should not, although bound thereto by its contract with W. R. Grace & Co., have sent the "*Tampico*" on its second voyage, and having done so can recover as damages, the market value of the nitrate cargo in New York less the cost

in South America and less the freight, instead of the loss that it has actually suffered.

In advancing this contention, appellant has, as we have heretofore pointed out, overlooked the absolute prerequisite to the application of the doctrine of anticipatory breach established by the authorities above cited, and that prerequisite is that the other party, (the appellee in this case) *must accept, treat as such, and act upon* the "anticipatory breach". It is without contradiction that the appellee neither accepted, treated as a breach, nor acted upon the said telegraphic notice of such breach given by appellant. On the contrary, it elected, as the law permits it to elect, to stand on the contract and endeavor to carry it through, and the breach of contract by appellant took place when appellee was prevented from carrying out the stipulated voyage and the vessel was wrongfully taken from its possession on May 19, 1916. The doctrine of "anticipatory breach" has, therefore, no application to the case at bar..

In connection with its argument in this behalf, appellant says, in addition, on pages 22 and 23 of its brief that it must have been the real intention of appellee to transport the cargo of nitrate for W. R. Grace & Co. from the West Coast of South America to *San Francisco*, notwithstanding its contract with W. R. Grace & Co. to carry the cargo from the West Coast of South America to the *East Coast of the United States*.

The contract between appellee and W. R. Grace & Co. appears on page 16 of the new apostles as follows:

“January 4, 1916

Messrs. W. R. Grace & Co.,  
New York City.

Dear Sirs:—

Attention Mr. Fischer. Yours of the 3d received.

‘*Tampico*’ We confirm your statement that this steamer is substituted for the ‘*Eureka*’ and if the canal is closed when she is ready to sail from nitrate port she is to proceed to San Francisco with one dollar per ton less freight than via the canal, say \$8 per ton.

Very truly yours.”

It is uncontradicted that the canal was open when the “*Tampico*” was ready to sail from the nitrate port. This contract, by reference to the contract between the same parties on the “*Eureka*” which was submitted therewith, (Second Apostles, page 17) provided for a voyage from the West Coast of South America, through the canal, to the East Coast of the United States with freight at the rate of \$9 per ton. It then provides that in the event that the canal is closed at the time the vessel is ready to leave the nitrate port that, instead of the stipulated voyage, she may proceed to San Francisco at a less rate of freight. The canal, having been open at the time the “*Tampico*” was ready to leave the nitrate port, it became the absolute engagement of appellee to transport the cargo from the West Coast of South America, through the

canal, and deliver it on the East Coast of the United States.

It may be, as contended by counsel, that the fact that the canal was open when the "*Tampico*" was ready to leave the nitrate port was the result of an accident to the vessel, or unforeseen contingency, but this accident or contingency fixed the absolute responsibility of the appellee to carry out the stipulated voyage through the canal, and is the very contingency in anticipation of which the parties contracted and it is because appellee had entered into this contract with W. R. Grace & Co. that the "*Tampico*" was sent on her second voyage.

The measure of damages contended for *by appellant* in its brief has never been applied to a case such as is here presented. The District Court on the second trial has held, and held properly, that the damages claimed by appellee are supported by the evidence and estimated pursuant to a proper measure of damages.

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#### AMOUNT AND MEASURE OF DAMAGES.

It is the unquestioned fact that at no time during the course of the first trial, in the brief submitted to this Court on the appeal, nor on the second trial of this case, has the correctness and propriety of this account, the amount thereof, or its items, been questioned by appellant.

The elements and items of appellee's damages and the statement and account thereof appear in the



deposition of the witness Cahill and are as follows (First Apostles, pages 125-129):

Q. What loss, if any, did Sudden & Christenson sustain by reason of the action of Crossett Western Lumber Company in withdrawing the '*Tampico*' from your service prior to the end of her second voyage?

A. We lost \$14,871.50.

Mr. LILLICK. Q. Counsel for Crossett Western Lumber Company has objected to your testifying to that loss, upon the ground that it calls for your conclusion with reference to that loss. State upon what you base the computation.

A. On the amount charged by W. R. Grace & Co. for the steamer having delivered the cargo at San Francisco instead of the Atlantic Coast; on the expense of operating the steamer to San Francisco instead of on the Atlantic Coast; also in accordance with the charter-party, we were to receive from the Crossett Western Lumber Company  $2\frac{1}{2}$  percent of the charter hire if the steamer was delivered back to them by us on the Atlantic Coast.

Q. That in a general way is the basis upon which you computed the amount. Will you state in detail, if you have the computation, how each item of the loss is made up, so that the total which you have stated is arrived at?

A. Taking the engineer's log as a basis as to the consumption and the speed of the vessel, and taking the mileage as a basis, the steamer was  $4\frac{1}{6}$  days longer in coming to San Francisco than she would have been had she gone to New York. The steamer, according to the engineer's log, burned an average of 3.737 barrels of fuel oil per hour. The steamer lost, on account of putting into San Pedro, due to shortage of provisions, 13 hours and 52 minutes. W. R. Grace & Co., as charterers for whose account we were freighting the nitrate, charged \$4.70 per ton on the whole cargo of



2,787 tons. Against that we allowed a credit to the Crossett Western Lumber Company of the expense of sending the steamer through the Panama Canal, tolls which are as follows: Panama Canal tolls for time occupied in transit through the Canal; fuel consumed in transit through the Canal. On that basis I figured the loss.

Q. Have you those figures carried out on the memorandum from which you are apparently reading, so that you can state them in such form that they can be taken down in your deposition?

A. Yes.

Q. Will you read them into the record, please?

A. 'Steamer Tampico. Loss sustained by Sudden & Christenson account delivery cargo San Francisco instead of New York.' Callao being the last port of call, the figures below are calculated as from Callao. From Callao to San Francisco '*Tampico*' covered 4098.4 miles in 530 hours: consumed 1981 barrels of fuel oil. Average 7.73 miles per hour or 3.737 barrels of fuel oil per hour. Callao to San Francisco, 4098.4 miles at 7.73, 530 hours. Callao to New York 3320 miles at 7.73, 430 hours. Excess, 778.4 miles at 7.73, 100 hours, or  $4\frac{1}{6}$  days.

Excess time coming to San Francisco,	
as above, $4\frac{1}{6}$ days at \$325.00	\$ 1,354.25
Fuel, 100 hours at 3.737 barrels per hour, at \$2	747.40
Time lost in San Pedro fueling, 13 hours, 52 minutes, at \$325.00	188.24
Commission, $2\frac{1}{2}\%$ on charter hire, \$67,540.39 at $2\frac{1}{2}\%$	1,688.50
Deducted by charterers from freight money account delivery of cargo at San Francisco instead of New York, 2787 tons nitrate at \$4.70 per ton	13,098.90

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\$17,077.29

Less Panama Canal tolls, 1654 net tons at \$1.25	\$2,067.50	
Usual time occupied in transit through Canal 8 hours, at \$13.54	108.32	
Usual fuel consumed in transit through Canal, 4 hours at 3.737, 14.948 barrels at \$2.	29.90	2,205.72
		<hr/>
Leaving a balance due of		\$14,871.57

Q. Has demand been made upon W. R. Grace & Co. for the payment to Sudden & Christenson of the amount named in the charter for the transportation of this nitrate?

A. Yes, sir.

Q. Has anything been paid by W. R. Grace & Co. to Sudden & Christenson on account of that?

A. Not to my knowledge.

Q. Do you know whether it has been?

A. I know it has not been.

Q. Your position is such in the company that had it been paid you would know it?

A. Yes."

Mr. Cahill's testimony, given on the second trial, in connection with this account, appears on pages 20 and 21 of the Second Apostles, as follows:

"Q. I hand you the said Apostles on appeal" (First Apostles) "and call your attention to a statement of account or of loss and damage covering the loss and damage claimed by Sudden & Christenson on account of the alleged action upon the part of Crossett Western Lumber Company in directing the "*Tam-pico*" to return to San Francisco for redelivery on or about May 15, 1916, instead of proceeding on her voyage for W. R. Grace & Co., to the East Coast of the United States

for redelivery on or about June 15, 1916, which statement of account and statement of loss or damage appears on pages 127, 128 and 129 of the said apostles on appeal, and I ask you if that statement is in each and every particular correct, and is a statement of the loss and damage by Sudden & Christenson on that account?

A. Yes, it is.

Q. Is that statement made up in the usual and customary method in the course of your business, and of the business of firms in a similar line of business?

A. Yes, sir.

Q. Was there an additional amount with reference to which you suffered loss or damage on account of the vessel being off hire during the charter term?

A. Yes.

Q. What is that amount?

A. \$2477.27.

Q. So that the total damage suffered by you is the balance due shown in the statement which you have referred to, of \$14,871.57, plus the amount that you have just stated, \$2477.27?

A. Yes.

*It is significant to note that counsel for appellant did not object, even upon the introduction of this testimony on the second trial, as to the competency or relevancy thereof, as to the propriety of the measure of damages therein stated, as to the knowledge of the witness in regard thereto, or in any other manner or particular whatsoever. From the inception of these proceedings up to the present time, this account has been practically conceded to be correct, and it is only now, in a last minute attempt to render impotent the judgment and decree of the Court, that appellant seeks to*

attack this account. *Appellant has never offered or sought to offer evidence contradicting or even touching upon the amount or measure of damages claimed by appellee.* Even the objection to Mr. Cahill's testimony with reference to this account, given at the first trial, noted on pages 26 and 27 of appellant's brief, goes only to the alleged fact that the witness is alleged to have had no personal knowledge of the accuracy of the account, and in no way attacks the propriety of the account, or its items, or the measure of damages pursuant to which it was prepared. On the second trial, Mr. Cahill testified positively (and his testimony was not attacked either by objection or cross-examination or otherwise) that the statement is in each and every item correct and is a statement of the loss and damage by Sudden & Christenson, and that it was made up in the usual and customary method in the course of appellee's business and of the business of firms in a similar line of business.

Appellant attacks only one item of the account—that of \$13,098.90, deducted by charterers from freight money account delivery of cargo at San Francisco instead of New York, 2787 tons nitrate at \$4.70 per ton. Although the statement of account appearing in the record (First Apostles, pages 127 and 128) is entirely clear as to its terms, it may be of some assistance to the Court to briefly explain the various items thereof.



**Excess time coming to San Francisco \$1354.25.**

The record shows (First Apostles, page 127) the difference in the distance and time consumed between the port of Callao, the last port of call, (whether the vessel proceeded to New York or to San Francisco) to be an excess of 778.4 miles at 7.73 miles per hour, 100 hours, or 4 1/6 days, at the charter rate of \$325 per day.

**Fuel—\$747.40.**

3.737 barrels of oil at \$2.00 per barrel are shown to have been used per hour during the excess time of 100 hours.

**Time lost in San Pedro—\$188.24.**

This lost time is estimated at the rate of charter hire.

**Commission on charter hire—\$1688.50.**

Clause 30 of the charter party (First Apostles, page 14) provides that 2½% commission is due on the amount of the charter money to Sudden & Christenson but that, should delivery be made on the West Coast of North America, Sudden & Christenson should not receive said commission. Under cross-examination on page 131 of the First Apostles, the witness Cahill states that Sudden & Christenson were to get 2½% of the total freight money if the steamer was delivered on the Atlantic Coast. Inasmuch as the steamer was delivered on the Pacific Coast on account of the wrongful acts of Crossett-Western Lumber Co., Sudden & Christenson were



deprived of this commission to their damage in the amount thereof.

**Deducted by charterers from freight money on account of delivery of cargo at San Francisco instead of New York \$13,098.90.**

The charterers referred to are, of course, W. R. Grace & Co., who held Sudden & Christenson responsible for their failure to deliver the nitrate cargo on the Atlantic Coast. Mr. Cahill testifies that Sudden & Christenson received nothing from W. R. Grace & Co., for carrying the nitrate cargo (First Apostles, page 125). It further appears that the amount of this item was charged to Sudden & Christenson by W. R. Grace & Co., because the cargo was delivered at San Francisco instead of on the Atlantic Coast and as the actual cost of transshipment to the eastern destination, and that W. R. Grace & Co., have withheld this amount from Sudden & Christenson (First Apostles, page 131). It is therefore clearly shown that this sum of \$13,098.90 is the actual loss of Sudden & Christenson as charged to them and withheld and collected by W. R. Grace & Co., and is the damage actually sustained by Sudden & Christenson on account of the misdelivery of the cargo at San Francisco, caused by the acts of Crossett-Western Lumber Company, *and Mr. Cahill testified positively to this fact on the second trial without attack or contradiction by appellant* (Second Apostles, pages 20, 21).

The account then shows three credit items in favor of Crossett Western Lumber Co., giving the

last named company the benefit of nonpayment of canal tolls, saving of time on account of not going through the canal, and saving of fuel on account of the same cause. These credits are included in the account for the obvious reason that Sudden & Christenson did not have to pay out these amounts. There is thus shown a balance due to Sudden & Christenson of \$14,851.57. To this amount must be added the sum of \$2477.27 due on account of the vessel being off-hire from April 3, 1916, to April 11, 1916. The stipulation of facts contained in the record provides that the last mentioned charge is on account of time off the charter under Par. 17 of the charter party, being the time that the vessel was off-hire from 12:45 p. m. April 3, 1916 to 3:40 p. m. April 11, 1916, total, 7 days, 14 hours, 55 minutes, at \$325 per day, the rate of charter hire (Apostles, pages 194, 195). The stipulation is further to the effect that prayer had been made by Sudden & Christenson to be permitted to amend its pleading if the Court felt such an amendment necessary to properly present the amount of its claim which included this item. Pursuant to the suggestion of the District Court the amendments have been made to appellees' answer and cross-libel (Second Apostles, pages 26-30). In addition the testimony shows that the vessel went ashore on the coast of Peru and remained off-hire for the said time on account of said stranding (Apostles, page 125).

On the basis of this account, and the testimony in connection therewith, the District Court on the second trial awarded the unpaid charter hire to appellant in the sum of \$6015.61, being \$8492.88, the stipulated amount, less the said sum of \$2477.27 due appellee on account of off-hire; and awarded to appellee its said damages in the sum of \$14,851.57, directing that a decree be entered for appellee for the difference in the sum of \$8799.96, with interest at 7% per annum from May 19, 1916, the date when appellant took over possession of the "*Tampico*" at San Francisco (Stipulation of Facts, First Apostles, page 143).

It is the conceded fact that upon the withdrawal of the "*Tampico*" by appellant, during the second voyage, appellee was forced to bring to *San Francisco* a cargo that it had agreed to carry to the *Atlantic Coast*, and that it was unable, by reason of its said agreement with the owners of the cargo, to collect freight money because of such misdelivery, (First Apostles, pages 125, 128 and 129). The amount charged against appellee on account of such misdelivery represents the added cost of transporting the cargo to its agreed destination over the cost that would have been paid if the cargo had been transported as agreed. The added cost is the cost of transshipping the cargo from *San Francisco* to its ultimate destination. Appellee is in the position, therefore, of having had to pay the additional cost of transportation made necessary by the wrongful withdrawing of the "*Tampico*" from the agreed

upon voyage and the item of the account, based upon the deduction by W. R. Grace & Co. from freight money on account of the misdelivery of the cargo, is based upon the discrepancy in the freight rates between San Francisco, as a port of destination, and the ultimate port of discharge as a port of destination.

The appellee and W. R. Grace & Co. by stipulating for a delivery of the cargo at New York at \$9 per ton, and then stipulating that *if the canal was closed* that the cargo should be delivered at San Francisco at \$8 per ton, have not fixed, nor endeavored to fix, the measure of damages arising out of the misdelivery of the cargo at San Francisco which was due to appellant's breach of contract, for it was the fact that the canal was not closed, but open. It is only fair to assume that W. R. Grace & Co., having contracted with appellee for the delivery of the cargo at New York, in the event that the canal was open, made its own arrangements accordingly.

Appellee's claim for damages is not, as stated by counsel, based upon *the assumption* that W. R. Grace & Co., wanted the nitrate cargo in New York, but upon *the fact* that an agreement to transport the cargo had been entered into, nor does the measure of damages which appellant, in its brief, *says* would have been applicable in the event that the cargo had been lost in transit apply to the issues in the instant case, for, in the instant case, the measure of damages that applies is the one that



has been universally applied to misdelivery of cargo and failure to carry and deliver as agreed as established by the authorities hereinafter cited.

Appellant admits, in quoting Mr. Cahill's testimony on page 30 of its brief, that the item of "deduction for misdelivery" is based upon the added cost of transportation from San Francisco to the ultimate destination of the cargo. If the cargo was not transported all the way to New York by virtue of a compromise arrangement between appellee and W. R. Grace & Co., appellant has benefitted thereby, and appellee's damages have been minimized.

This Court sent this case back to the District Court for the sole purpose of ascertaining whether or not the contractual relationship was entered into between appellee and W. R. Grace & Co., prior to January 11, 1916, and if so, to then assess the damages. There is no contention but that it was entered into on January 4, 1916, and this Court did not find, as appellant groundlessly insists, that the evidence of damages submitted on the prior appeal was insufficient.

On pages 33 to 37 of its brief, counsel submits quotations from various authorities by which it attempts to show that the measure of damage in this case should be the difference between the market value of the cargo at the point of shipment and the market value it would have had at the place of destination, less freight. In citing these authorities, appellant overlooks the fact that this case



is not one of failure to transport *with the goods remaining at the loading port*, but is a case of failure to transport as agreed and *misdelivery* of cargo carried *with the goods being transported by another agency*. This situation was the one that existed between appellee and W. R. Grace & Co. and is naturally and proximately the situation between appellee and appellant, wherein the former is attempting to recover from the latter the damages occasioned by appellant's breach of contract and unwarranted termination of and interference with the agreed upon second voyage of the "*Tam-pico*".

The misapplication of the said authorities quoted by counsel to the issues of the case at bar, and the fallacy of appellant's contentions as to the proper rule of damages and of its attack upon the items of the account of damage of record for which recovery is sought, is best evidenced by the case of the "*Oregon*", 55 Fed. 666. In that case the Court speaking through Judge Taft says on pages 673, *et seq*:

"One of the chief objections by appellants to the decrees appealed from is the measure of damages enforced thereby. It is said that the correct measure is the difference between the market values of the two cargoes of ore at Cleveland and Marquette, less the contract rate of freight; whereas, the measure adopted by the Courts below was the difference between the contract rate of freight and the rate of freight which the libellant actually paid to transport the ore. *Damages for breach of contract should be such compensation as will re-*

*store the injured party to the same pecuniary condition that he would have been in had the contract been performed.* Where one contracts with a carrier to transport ordinary merchandise, having a market value, from one point to another, the profit which both he and the carrier may reasonably expect him to make out of the transaction is the difference between the market value of the merchandise at the point of destination and the market value at the point of shipment, less the freight under the contract. The pecuniary difference between the shipper's condition with the contract performed, and his condition *if the merchandise is not shipped but remains at the point of shipment*, is this profit which is therefore his legal damage. But it is a general rule that it is the duty of one party to a contract which has been broken by the other to use reasonable diligence to reduce the damages arising from the breach.

If, therefore, in cases of freight contracts, a carrier refuses to perform, it is the duty of the shipper, if he can reasonably expect thereby to reduce his loss, to seek other means of transportation and perform the contract himself. *In such a case, the difference between his actual pecuniary condition and that in which he would have been had the carrier transported the goods under the contract is not the profit which he would have made had the contract been performed, for the contract has been performed and he has acquired the opportunity to sell his merchandise at the market value prevailing at the place of destination, but it is the increased expense of performing the contract—that is, the difference between the contract rate of freight and the freight which he was actually obliged to pay to secure performance*, and it would seem to be a good defense against a claim for profits lost by breach of a freight contract that the shipper could have

saved himself, or at any rate could have reduced his loss by employing other means of transportation.

This may be hardly consistent with Chief Justice Taney's opinion in *Harrison v. Stewart*; *Taney* 485, but it is in accordance with the weight of modern authority. 2 *Sedg. Dam.* (8th Ed.), Sec. 482. In such a case it would be necessary for the defendant to show that the shipper could reasonably expect to reduce his loss by other transportation. *But it would hardly seem so necessary, in order to justify the shipper in seeking other means of transportation and charging the carrier with the increased freight, for him to show either that the profit from the executed contract would have equalled or exceeded the increase in the freight.* When the shipper contracts with a carrier to transport merchandise, he is legally entitled to have his merchandise carried without regard to the question of whether the transaction would have been profitable to him or not. Were the contract one which justified a resort to a Court of Equity for its specific performance, it certainly would not defeat the relief prayed for that the result would be unprofitable to the complainant."

"An examination of the authorities shows that in all cases where the measure of damages for a failure or refusal of the carrier to receive goods tendered for shipment under a contract has been held to be the difference between the market value of the goods at the destination and their market value at the point of shipment, less the contract price of the freight, *the shipper has not attempted to perform the contract by procuring transportation by other means.*" (Citing cases.)

"*But, where the goods, not received by the contracting carrier, are transported by another at a higher rate than the contract price, this*

*measure is not adopted. In such a case the goods, it may be, are brought at the same time into the same market and sold for the same market price as if carried under the contract, but it costs more to get them there. Under these circumstances, neither reason nor authority leaves any doubt that, within the limitation already referred to, if the substituted means of transportation shall be reasonable and not extravagant, the measure of damages is the difference between the contract and the actual price of freight."* (Citing cases.)

See also *Lumberman's Mining Co. v. Gilchrist*, 55 Fed. 677.

Applying the rule laid down in the above cited opinion to the facts of the case at bar, it appears that this case is not one of a refusal of a carrier to transport merchandise that it had contracted to carry, with the goods consequently remaining at the loading port, but a case where the goods were actually transported by another agency and arrived at their originally intended destination *but at an increased cost*; to-wit: \$4.70 per ton from San Francisco to ultimate destination. The whole theory upon which the admirably written opinion of Judge Taft is based is that a shipper should be compensated for the damages which naturally and proximately result from the breach of contract on the part of the carrier. It is stated further, that the measure of damages as to difference in market values does not apply in cases such as the case at bar *for there has been no loss of market, the goods having been actually transported to their intended*



*destination, but that there has been a loss and that loss is the difference between what it would have cost to transport the cargo, if the carrier had lived up to its agreement, and what it actually did cost to transport the cargo when the carrier failed to live up to its agreement. Every statement and rule made and laid down in the opinion in the "Oregon" applies exactly to and fully supports appellee's statement of damages and the measure thereof as found by the District Court. The case cited is exactly in point.*

If the appellant had not wrongfully withdrawn the "*Tampico*" from her second voyage, W. R. Grace & Co. would have transported the cargo of nitrates from the West Coast of South America through the Canal to the East Coast of the United States at the stipulated freight rate of \$9 per ton. The appellant did, however, wrongfully withdraw the "*Tampico*" and as a result the cargo was misdelivered at San Francisco and transported to its ultimate destination at an additional cost of \$4.70 per ton, which was properly charged by W. R. Grace & Co. against the appellee, and for which appellee seeks recovery against the appellant. Under the rule laid down in the cases above cited, that was the only thing that W. R. Grace & Co. and the appellee could do under the circumstances, and the additional cost of transporting and delivering the cargo is the only possible measure of damages that can apply.



Viewing the situation then from the aspect of the appellee, if, under the same circumstances, the appellant had not wrongfully withdrawn the "*Tampico*" from her second voyage, appellee would have received \$9 per ton for transporting the cargo from the West Coast of South America through the Canal to the East Coast of the United States, and would not have been forced to expend the various items of the account due to the 100 hours excess time coming to San Francisco, nor would it have lost its  $2\frac{1}{2}\%$  commission on the charter hire provided for in the charter party, nor would it have been forced to pay or allow to W. R. Grace & Co. the additional cost of \$4.70 per ton for transporting the cargo from San Francisco to its ultimate destination. The damage, therefore, which naturally and proximately accrued to appellee by reason of appellant's breach of contract, is composed of the various items appearing in appellee's statement of loss and damage.

In further substantiation of the propriety of the acts of appellee and W. R. Grace & Co., and the measure of damages contended for, it appears from the letter of the master of the "*Tampico*" to appellee (First Apostles, pages 121-123) that a substantial portion of the cargo had been loaded on the "*Tampico*" prior to the time that the master was finally directed to proceed to San Francisco instead of to New York. Was it then the duty of the shipper to discharge this portion of the cargo and seek to find other means of transportation to New

York? Was it then the duty of the shipper to discharge this portion of the cargo and abandon it at the loading port and thus seek to establish as a measure of damages the difference in market values at the loading port and the port of destination, less the freight? It was most certainly not the duty of the shipper to pursue either of these courses of action and thus aggravate rather than minimize the damages occasioned by appellant.

The rule laid down in the "*Oregon*" has been universally followed in cases of this kind. Following the rule laid down in the case cited, it is apparent that the difference between the actual pecuniary condition of the shipper, due to the act of appellant in unlawfully withdrawing the "*Tampico*" from her second voyage, and that in which the shipper would have been had the carrier transported the goods under the contract, *is not the profit which the shipper would have made had the contract been performed, for the contract has been performed and he has acquired the opportunity to sell his merchandise at the market prevailing at the place of destination, but it is the increased expense of performing the contract—that is, the difference between the contract rate of freight and the freight which he was actually obliged to pay to secure performance, to-wit, \$4.70 per ton.* It is, therefore, in the language of the opinion in the "*Oregon*" not necessary

"in order to justify the shipper in seeking other means of transportation, and charging the carrier with the increased freight, for him to show either that the profit from the executed

contract would have equalled or exceeded the increase in the freight. When the shipper contracts with a carrier to transport merchandise, he is legally entitled to have his merchandise carried without regard to the question of whether the transaction would have been profitable to him or not. \* \* \* In such a case the goods, it may be, are brought at the same time into the same market and sold for the same market price as if carried under the contract, but it costs more to get them there. Under these circumstances, neither reason nor authority leaves any doubt that \* \* \* the measure of damages is the difference between the contract and the actual price of freight."

The rule laid down in the "*Oregon*", which has been followed without exception, is conclusive authority against the measure of damages contended for by appellant in its brief and is equally conclusive authority that the measure of damages contended for by appellee and allowed by the District Court is the only measure of damages that can possibly apply to the case at bar, and pursuant to which the appellee has suffered loss and damage in the sum assessed by the District Court.

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### Conclusion.

As we have heretofore pointed out, this Court has held that there has been a breach of contract on the part of appellant for which it is responsible to appellee in damages. In so holding it has held that the representations made by appellant were a

part of its contract with appellee. It has held that appellee, in entering into its contract with W. R. Grace & Co., had a right to, and did, rely upon the representations of appellant. It has held that there was a contract between W. R. Grace & Co. and the appellee. It has not questioned the damages sought to be recovered by appellee, nor the propriety of the measure thereof. These matters are *res adjudicata* and as such will not be again considered.

“It is not the habit of this Court to consider points again open for discussion which have been once deliberately decided, and which have furnished the ground work for the judgment already rendered in the same cause in a former stage of its proceedings.” *U. S. v. 422 Cases of Wine*, 1 Pet. 547; 7 L. Ed. 257.

Appellant has, however, endeavored on this appeal to again raise and reopen these questions and issues that have already been finally and definitely determined and settled, and, under the guise of an appeal from the decree of the Court below on the second trial, to make a last endeavor to avoid and defeat the former judgment and decree of this Court. In remanding this case to the District Court, this Court made inquiry only as to one fact and remanded the case for the sole purpose of ascertaining that fact. In so doing it held, and held properly, that unless the contract of affreightment between W. R. Grace & Co. and appellee was entered into prior to January 11, 1916, the date when appellant first sought to prematurely terminate the agreed-upon second voyage, that appellee could not



recover damages based upon that contract of affreightment. All other issues of the case were finally and definitely decided.

Pursuant to the directions of this Court, the District Court found that the contract of affreightment between appellee and W. R. Grace & Co. for the second voyage of the "*Tampico*" from the West Coast of South America, through the Canal to the East Coast of the United States was entered into on *January 4, 1916*. This finding was based upon the testimony of Mr. Cahill, which, in effect, recites the following facts:

1. That on or about December 27, 1915, appellee received a communication from appellant advising it that the redelivery date of the "*Tampico*" was June 15, 1916 (Second Apostles, page 13).

2. That forthwith, and on or about December 31, 1915, appellee exercised its option for the second voyage of the "*Tampico*" (Second Apostles, page 14).

3. That on or about January 3, 1916, appellant acknowledged receipt of appellee's notice of exercise of said option and inquired as to the voyage (First Apostles, pages 14-15).

4. That immediately thereafter, on January 4, 1916, appellee, through its New York agents, entered into a contract of affreightment with W. R. Grace & Co. for the second voyage of the "*Tampico*", to carry a cargo of nitrates from the West Coast of South America, through the Canal, to the

East Coast of the United States, at the freight rate of \$9 per ton, but that if the Canal was closed, at the time the vessel was ready to leave the nitrate port, to San Francisco at the freight rate of \$8 per ton (Second Apostles, page 16).

5. That to the letter effecting that agreement was attached, for reference, a copy of the agreement between the same parties on the "*Eureka*" (Second Apostles, page 70). (It is the admitted fact that the Canal was open at the time the "*Tampico*" was ready to leave the nitrate port.)

6. That pursuant to this contract the "*Tampico*" was dispatched on her second voyage to carry a cargo of nitrates for W. R. Grace & Co. from the West Coast of South America, through the Canal, to the East Coast of the United States (Second Apostles, pages 17-18).

7. That for the first time, on January 11, 1916, appellee was notified by appellant that the time and place of redelivery of the "*Tampico*" would be the Pacific Coast on May 15, 1916, instead of the Atlantic Coast on June 15, 1916.

Pursuant to the above facts, the appellant was awarded its unpaid charter hire, and the appellee was awarded its damages, according to its statement of account, in the sum of \$14,871.57, plus \$2477.27 deduction for time off-hire under the terms of the charter party (which item is not contested by appellant), leaving a net decree in favor of appellee in the sum of \$8799.96 with interest at 7% per annum from May 19, 1916, the date when appel-

lant wrongfully retook possession of the "*Tam-pico*".

All other questions having been finally and definitely determined by this Court, and being res adjudicata in this case, the District Court on the second trial made its findings, as aforesaid, and although these findings on these particular facts are the only ones that can be attacked on this appeal, the appellant has entirely failed to offer one word of argument or to cite one authority toward a reversal of these findings.

It is respectfully submitted, therefore, that the decree of the District Court should be affirmed.

Dated, San Francisco,  
October 23, 1922.

IRA S. LILLICK,  
*Proctor for Appellee.*

THEODORE M. LEVY,  
*Of Counsel.*

No. 2414

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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CONTINENTAL NATIONAL BANK, a Corpora-  
tion,

Plaintiff in Error,

vs.

MARY NEVILLE,

Defendant in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District  
Court, for the Southern District of Cal-  
ifornia, Southern Division.

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FILED

AUG 14 1922

F. D. MONCKTON,  
CLERK.

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No.

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United States  
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## INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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**Names and Addresses of Attorneys:**

For Plaintiff in Error:

HAAS & DUNNIGAN, Esqs., Citizens National  
Bank Building, Fifth and Spring Sts., Los  
Angeles, Calif.

For Defendant in Error:

GEO. B. ROSS, Esq., and  
NEWBY & PALMER, Esqs., Washington Build-  
ing, Third and Spring Sts., Los Angeles, Cali-  
fornia.

IN THE DISTRICT COURT OF THE UNITED  
STATES, FOR THE SOUTHERN DISTRICT  
OF CALIFORNIA, SOUTHERN  
DIVISION.

MARY NEVILLE,	)	No. 896 Civil.
	)	
Plaintiff.	)	
	)	CITATION ON
vs.	)	WRIT OF
	)	ERROR.
CONTINENTAL NATIONAL	)	
BANK, a corporation, and FRED	)	
BIRDSALL,	)	
	)	
Defendants.	)	

United States of America, - SS

To Mary Neville, plaintiff above named, and defendant in error, GREETING:

You are hereby cited and admonished to appear before the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to writ of error duly issued and now on file in the clerk's office of the United States District Court for the Southern Division of the Southern District of California, wherein Continental National Bank of Los Angeles is plaintiff in error, and you are defendant in error, to show cause if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Oscar A. Trippet, United States District Judge for the Southern District of California, this 10th day of July, 1922.

Trippet

---

United States District Judge.

Received a copy of the above citation on writ of error this 11th day of July, 1922.

George B Ross and  
Newby & Palmer

---

Attorneys for Plaintiff.

[Endorsed]: Original No. 896 Civil IN THE DISTRICT COURT OF THE UNITED STATES, for the Southern Division of the Southern District of California. MARY NEVILLE Complainant vs. CONTINENTAL NATIONAL BANK, a corporation, et al, Defendants CITATION ON WRIT OF ERROR FILED JUL 11 1922 CHAS. N. WILLIAMS, Clerk by R S Zimmerman Deputy Clerk HAAS & DUNNIGAN Suite 302 B. F. Coulter Building 213 S. Broadway Los Angeles, Cal. Solicitors for deft.

WRIT OF ERROR  
UNITED STATES OF AMERICA - SS

The President of the United States of America, To  
the Honorable, the Judges of the District Court  
of the United States for the Southern District of  
California, Southern Division, GREETING:

Because in the record and proceedings, as also in the  
rendition of a judgment and plea which is in said Dis-  
trict Court, before you, or some of you, between the  
Continental National Bank of Los Angeles, defendant  
and plaintiff in error, and Mary Neville, as plaintiff  
and defendant in error, said cause being numbered  
896 Civil of the files of your court, a manifest error  
hath happened, to the great damage of said Conti-  
nental National Bank, plaintiff in error, as by its  
complaint appears:

We, being willing that error, if any hath been, should  
be duly corrected, and full and speedy justice done to  
the parties aforesaid in this behalf, do commend you  
that if judgment be therein given, that then, under  
your seal, distinctly and openly, you send the record  
and proceedings aforesaid, with all things concerning  
the same, to the United States Circuit Court of Ap-  
peals, for the Ninth Circuit, together with this writ,  
so that you have the same at the City of San Fran-  
cisco, in the State of California, within thirty days  
from the date hereof, in the said Circuit Court of  
Appeals, to be then and there held, that, the record  
and proceedings aforesaid being inspected, the said Cir-



cuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS, the Honorable William H. Taft, Chief Justice of the United States, the 7th day of July, in the year of our Lord one thousand nine hundred and twenty-two.

CHAS. N. WILLIAMS,

Clerk of the United States District Court in and for the Southern District of California, Southern Division,

(seal)

By R S Zimmerman

Deputy Clerk.

Allowed by

Trippet

District Judge.

[Endorsed]: ORIGINAL No. 896 Civil IN THE DISTRICT COURT OF THE UNITED STATES, for the Southern Division of the Southern District of California. MARY NEVILLE Complainant vs. CONTINENTAL NATIONAL BANK a corporation et al, Defendants WRIT OF ERROR FILED JUL 7 1922 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk HAAS & DUNNIGAN Suite 302 B. F. Coulter Building 213 S Broadway Los Angeles, Cal. Solicitors for deft.

IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT  
OF CALIFORNIA SOUTHERN  
DIVISION

MARY NEVILLE	)	
	)	
Plaintiff	)	AMENDED
vs.	)	COMPLAINT
	)	FOR MONEY
CONTINENTAL NATIONAL	)	DEMAND
BANK and ALFRED W. BIRD-	)	\$5,000.00
SALL	)	
	)	
Defendants	)	

Comes now Mary Neville, and the court having entered an order substituting her, the said Mary Neville, as the plaintiff herein, and with leave of court first had and obtained, files her amended complaint, and avers:

I.

That the plaintiff is now and for many years last past has been a resident and citizen of the state of Texas.

II.

That the defendant, Continental National Bank, is a banking corporation duly organized and existing under and by virtue of the national banking laws of the United States, with its principal place of business at Los Angeles, state of California.

III.

That said defendants, Continental National Bank, and Alfred W. Birdsall, are residents of the said city of Los Angeles, and citizens of the state of California.

IV.

That said defendants are indebted to plaintiff in the sum of Four Thousand Four Hundred (\$4,400.00) Dollars, with interest thereon, for moneys had and received by them to the use of said plaintiff, Mary Neville.

V.

That plaintiff duly demanded of defendants the payment of said money on the 2d day of December, 1920, and defendants have failed and refused to pay the same or any portion thereof, except nine and eighty-five hundredths (\$9.85) Dollars.

VI.

That said sum of Four Thousand Four Hundred (\$4,400.00) Dollars, together with interest thereon from the 2d day of December, 1920, is now due from defendants to plaintiff and is wholly unpaid.

SECOND COUNT

And for a further and second cause of action plaintiff reavers paragraphs I, II and III of the first count hereof, and hereby refers to said paragraphs and makes them a part hereof.

IV.

That said defendant, Continental National Bank, is and has been for some years last past conducting a banking business in said city of Los Angeles.

V.

That the said plaintiff, Mary Neville, at the instance and solicitation of the defendant Birdsall, opened a

bank account with said bank on the 21st day of September, 1920, under the name of Mary Neville Bird-sall, and at various times deposited and caused to be deposited in her said account a total sum of Four Thousand Four Hundred (\$4,400.00) Dollars.

#### VI.

That the defendants withdrew from said account so deposited by said plaintiff, without the knowledge or consent of said plaintiff, and without her authority, all of said sum so deposited, except the sums of \$113.60 drawn therefrom by said plaintiff, and of \$9.85 now claimed to be held by said bank as a balance in said account.

#### VII.

That plaintiff has demanded and caused to be demanded of defendants the payment of the amount due to said plaintiff on said deposit account, by a check duly drawn on said account, and has been advised by said defendants that there is but \$9.85 remaining in said account, and the defendants have refused to pay the plaintiff any other or further sum than said balance of \$9.85.

#### VIII.

That there is now due and wholly unpaid from defendants to plaintiff the sum of Four Thousand Four Hundred (\$4,400.00) Dollars, with interest thereon from the date of said demand.

### THIRD COUNT

And for a further and third cause of action plaintiff reavers paragraphs I, II, III, IV and V of the

second count of this complaint, and hereby refers to said paragraphs and makes them a part hereof.

## VI.

Plaintiff avers that at all of the times of the said deposit and withdrawal of said funds the said plaintiff was a minor of the age of seventeen years, and the defendant Birdsall was a man of about fifty years of age. That said Birdsall, shortly prior to the time of the opening of said account, entered into a pretended marriage with this plaintiff for the purpose of procuring the money and property which constituted said plaintiff's estate, when in truth and in fact the said Birdsall then and there had a former wife living and from whom he had not been divorced, and which said former marriage was then and there in full force and effect, as the said Birdsall then and there well knew. That said Birdsall was an intimate friend and associate of various officers of the defendant bank; and the said Birdsall caused the employees and officers of said bank to enter upon their books containing said account of Mary Neville Birdsall the name of Fred Birdsall, so as to make it appear that said account of Mary Neville Birdsall was the joint account of said Mary Neville and the said defendant Birdsall; that said defendant Birdsall caused said employees and officers of said bank to so alter and change said books and account so that he, the said Birdsall, could withdraw said plaintiff's money from said bank and convert it to his own use. That the employees and officers of said



bank so carelessly and negligently conducted the business of said bank that they did, at the request of the said Birdsall alone so alter and change their said books and the account of said plaintiff by adding the name of Fred Birdsall thereto, without the knowledge or consent of said plaintiff and without any authority whatever so to do; and they carelessly and negligently paid out the funds and estate of the said plaintiff, Mary Neville, without the knowledge or consent or authority of said Mary Neville, upon checks signed by the defendant Birdsall only, and drawn against said account of Mary Neville Birdsall, without the knowledge or consent of the said plaintiff, Mary Neville. That said plaintiff attained the age of eighteen years on October 30, 1920.

#### VII.

That plaintiff has demanded the payment of the moneys so deposited in the said account of Mary Neville Birdsall from said defendants, and said defendants have wholly failed and refused to repay said sum or any part thereof, except the sum of \$9.85, which said bank claims to be the entire balance due on said account.

WHEREFORE plaintiff prays judgment against defendants for the sum of Five Thousand Dollars, and for all relief proper in the premises.

George B. Ross and

---

Newby & Palmer,

---

Attorneys for Plaintiff

MARY NEVILLE, being first duly sworn, deposes and says: That she is the plaintiff in the above entitled action; that she has read said amended complaint and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters therein stated upon information and belief, and that as to such matters she believes it to be true.

## Mary Neville

Jessie McDill

[Endorsed]: No. 896 Civil IN THE DISTRICT COURT OF THE UNITED STATES In and for the Southern District of California SOUTHERN DIVISION MARY NEVILLE Complainant vs. CONTINENTAL NATIONAL BANK et al Defendants AMENDED COMPLAINT FOR DAMAGES Received copy of the within Amended Complaint this 31 day of Jany 1921 Haas & Dunnigan Attorney for Deft Bank FILED Jan 31 1921 Chas. N. Williams, Clerk Fred E Subith Deputy NEW ADDRESS 1108 WASHINGTON BLDG. Los Angeles, Cal. Newby & Palmer Attorneys for plaintiff

IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT  
OF CALIFORNIA SOUTHERN  
DIVISION.

MARY NEVILLE,	) NO. 896 Civil.
	)
Plaintiff	)
	) AMENDED
vs.	) ANSWER OF
	) DEFENDANT,
CONTINENTAL NATIONAL	) CONTINENTAL
BANK and ALFRED W. BIRD-	) NATIONAL
SALL,	) BANK.
	)
Defendants.	)

Comes now the defendant, Continental National Bank, and for amended answer to plaintiff's complaint on file herein, for amended answer to the first count of said complaint, avers and denies as follows, towit:

I.

This defendant avers that it has not sufficient information or belief to enable it to answer the allegations of paragraph I of said first count of said complaint, and by reason of such lack of information or belief, it denies that plaintiff is a resident of the State of Texas, and upon information and belief avers that plaintiff is, and during all the times referred to in plaintiff's complaint herein, was resident of the State of California.

II.

This defendant, for answer to paragraph IV of said complaint, denies that it is indebted to the plaintiff

in the sum of Four Thousand Four Hundred (\$4,400.00) Dollars, or any other sum, either with or without interest, except the sum of Nine and 85/100 (\$9.85) Dollars, which said sum of Nine and 85/100 (\$9.85) Dollars is now on deposit to the credit of the plaintiff or the defendant Alfred W. Birdsall, in the hands of this defendant as a banking corporation.

### III.

This defendant, for answer to paragraph VI of said count of said complaint, denies that the sum of Four Thousand Four Hundred (\$4,400.00) Dollars, either with or without interest, either from the 2nd day of December, 1920, or any other date, is due from this defendant to the plaintiff.

This defendant, further answering said complaint, and for answer to the second count of said complaint, hereby re-iterates and repeats its answer to paragraphs I, II and III of said first count of said complaint to the same extent as if the said answers to said paragraphs were here repeated and re-iterated in *hic verba*.

### IV.

This defendant, for answer to paragraph V of said second count of said complaint, denies that the said Mary Neville, either at the instance of the defendant Birdsall or otherwise, or at all, opened any bank account with this defendant in her own name; alleges that the bank account therein referred to was opened by the said defendant Alfred W. Birdsall in the name of himself and or the plaintiff Mary Neville Birdsall,

his wife; this defendant denies that any money was deposited in said account by the said plaintiff; alleges that all moneys deposited in said account were deposited by the defendant Alfred W. Birdsall, and this defendant alleges that it is informed and believes, and upon such information and belief alleges the fact to be, that all of the sums so deposited in said account, were the moneys and property of the said defendant Alfred W. Birdsall, and not any of said moneys were the property of the said plaintiff.

V.

This defendant, further answering said second count of said complaint, for answer to paragraph VI of said second count, denies that it withdrew or removed from the account last hereinbefore referred to, either with or without the knowledge of the said plaintiff, or with or without her authority, any of the moneys deposited to said account, or in any account, except that it paid out of said account, upon the checks of the plaintiff and the said Alfred W. Birdsall, all of the moneys so deposited therein, except the sum of \$9.85, which still remains in said account.

VI.

For answer to paragraph VIII of said second count of said complaint, denies that there is now due or unpaid to the plaintiff by this defendant, the sum of \$4,400.00, or any other sum except the balance yet remaining in said account, towit the sum of \$9.85.

This defendant, further answering said complaint, for answer to the third count thereof, re-iterates and



repeats its answer to paragraphs I, II, III, IV and V of the second count of said complaint, to the same force and effect as though said answer to said paragraphs of the second count of said complaint were here repeated and re-iterated in *hic verba*.

## VI.

This defendant, for answer to paragraph VI of the third count of said complaint, avers it has not sufficient information or belief to enable it to answer the allegations of said paragraph VI hereinafter referred to, and by reason of such lack of information and belief, it denies that at any of the times of the deposits or withdrawals referred to in said third count of said complaint, that the plaintiff was a minor under the age of seventeen (17) years, or that the defendant Birdsall was a man of the age of fifty (50) years or thereabouts, or that the marriage entered into between the plaintiff and the said defendant Birdsall was pretentious or a pretended marriage, or for the purpose of procuring money or property which constituted plaintiff's estate, or any other money or property, or that the said Birdsall had a former wife living at the time of said marriage between said plaintiff and the defendant Birdsall, or that a divorce between said Birdsall and a former wife had not been granted, or that any former marriage between the said Birdsall and any other woman was then in force and effect, or that such or any facts were known to said defendant Birdsall, or that the said defendant Birdsall was an intimate friend or associate of the officers of the

defendant bank or that the said defendant Birdsall caused any of the employees or officers of the defendant bank to enter upon the books containing any account with the plaintiff, the name of the defendant Birdsall, other than as hereinafter directly alleged.

## VII.

This defendant, further answering said paragraph VI of said third count of said complaint, denies that the name of the defendant Birdsall was added to any account of the plaintiff with it as a bank, or on its books; denies that this defendant ever had any account with the said plaintiff other than a joint account between the plaintiff and the said defendant Birdsall; that said account was opened by the defendant Birdsall with his own money as such joint account, and was never thereafter altered or changed in any manner whatsoever; deny that the said defendant Birdsall caused the employees or officers of this defendant to alter or change its books, or that its books were either altered or changed in any respect whatsoever as alleged in said paragraph or otherwise. Deny that any of the employees or any of the officers of this defendant either carelessly or negligently conducted the business of this bank, either at the request of the defendant Birdsall or otherwise, or at all, so as to in any manner alter the books of this defendant, or alter or change the records or accounts of this defendant with the plaintiff by adding the name of the defendant Birdsall therein, or in any other respect whatsoever, either with or without the knowledge or consent

of the plaintiff, or with or without the authority of the plaintiff; deny that they either carelessly or negligently paid out any of the funds or estate of the plaintiff, without her knowledge or consent, and deny that the plaintiff attained the age of majority at any time subsequent to the opening of said account.

## VIII.

This defendant, as a further and separate defense to said complaint avers that at all times mentioned in said complaint, and in this answer, that the plaintiff held herself out to be and represented to the world, that she was the true and lawfully wedded wife of the defendant, Alfred W. Birdsall; that she resided within the State of California, and lived and co-habited with the said defendant Birdsall as his true and lawful wife, and that this defendant had not, at any of said times, any knowledge to the contrary, and that the said plaintiff by so holding out and representing herself as aforesaid to the world at large and to this defendant, has and is estopped from asserting or claiming that she was not married to defendant Birdsall, or that she was not of full majority and capable to transact and carry on business.

## IX.

This defendant is informed and believes, and therefore alleges, that at all of said times above set forth, the plaintiff well knew the true facts with respect to her age, and with respect to her marriage to the said Birdsall, and her marital condition, and with respect to her residence and to her being a resident of

the State of California, and that during all of said time said plaintiff represented herself to be of the age of eighteen (18) years, and over, and that she was fully cognizant of all of the facts, and the actual fact with respect to her age, and that this defendant had no information to the contrary.

WHEREFORE, this defendant prays that plaintiff take nothing by this action, and that it have its costs in and about this action expended, and such other relief as to the Court may seem proper in the premises.

HAAS AND DUNNIGAN,

Attorneys for Defendant,

Continental National Bank.

STATE OF CALIFORNIA, ( )  
 ) SS.  
COUNTY OF LOS ANGELES.(

W. D. HOWARD, being duly sworn, deposes and says: That he is an officer, towit, the Vice-President of the defendant corporation, Continental National Bank, named in the foregoing answer, and that he verifies said answer for and on behalf of said corporation, and as such officer thereof; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to such matters and facts therein stated upon information and belief, and that as to such matters and facts, that he believes it to be true.

W D Howard

---

Subscribed and sworn to before me  
this 14th day of March, 1921.

M J Wolfe

---

Notary Public in and for the County  
of Los Angeles, State of California.

(Seal)

[Endorsed]: ORIGINAL No. 896 IN THE DISTRICT COURT OF THE UNITED STATES for the Southern Division of the Southern District of California. MARY NEVILLE, Complainant vs. CONTINENTAL NATIONAL BANK, et al, Defendant AMENDED ANSWER OF DEFENDANT, CONTINENTAL NATIONAL BANK. Received copy of the within amended answer this 15 day of March 1921 George B. Ross Newby & Palmer Solicitors for Complainant FILED MAR 15 1921 Chas. N. Williams, Clerk C. W. Kerr Deputy HAAS & DUNNIGAN Suite 302 B. F. Coulter Building 213 S. Broadway Los Angeles, Cal. Solicitors for deft.



IN THE DISTRICT COURT OF THE UNITED  
STATES IN AND FOR THE SOUTHERN  
DISTRICT OF CALIFORNIA.  
SOUTHERN DIVISION.

\* \* \* \* \*

Mary Neville,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 896 Civil.
	)	
Continental National Bank, et al.,	)	
	)	
Defendants.	)	

We, the Jury in the above-entitled action, find in favor of the Plaintiff, and against the Defendants, Continental National Bank and Fred Birdsall, in the sum of \$3386/40 and interest.

Los Angeles, California, February 8, 1922.

F. H. Vesper  
Foreman

FILED FEB 8 1922

Chas. N. Williams, Clerk  
Louis J Somers Deputy

UNITED STATES OF AMERICA DISTRICT  
COURT OF THE UNITED STATES SOUTH-  
ERN DISTRICT OF CALIFORNIA.  
SOUTHERN DIVISION.

\* \* \* \* \*

Kate Neville, Guardian of the )  
Person and Estate of Mary Ne- )  
ville, a minor, )

Plaintiff, )

vs. )

No. 896 Civil.  
JUDGMENT.

Continental National Bank and )  
Alfred W. Birdsall, )

Defendants. )

On Tuesday, the 7th day of February, 1922, being a day in the January, A. D., 1922, Term of the District Court of the United States for the Southern District of California, Southern Division, this cause came on for trial before the Court and a jury to be duly impanelled; Wm. F. Palmer, Esq., and Geo. B. Ross, Esq., appearing as counsel for the plaintiff; and R. L. Dunnigan, Esq., appearing as counsel for the defendant Continental National Bank; and counsel for the respective parties being now ready to proceed with the trial of this cause, and the Court ordered that the trial be proceeded with; thereupon a jury of twelve men was duly impanelled; and witness on behalf of respective parties having been examined and exhibits introduced by respective parties, and said cause having

been continued to the 8th day of February, 1922, and after argument by respective counsel, and the instructions of the Court, said cause having been submitted to the jury for its consideration and decision, and, on said 8th day of February, 1922, the Jury having returned the following Verdict, to-wit:

“IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION. Mary Neville Plaintiff vs. Continental National Bank, et al, Defendants. No. 896 Civil. We, the Jury in the above entitled action, find in favor of the plaintiff, and against the Defendants, Continental National Bank and Fred Birdsall, in the sum of \$3386.40 and interest. Los Angeles, California, February 8, 1922. F. H. Vesper, Foreman” and the Court ordered that Judgment be entered in favor of the Plaintiff and against the Defendants in accordance with the Verdict of the Jury, with costs taxed in favor of the Plaintiff;

NOW, THEREFORE, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that the Plaintiff, Kate Neville, Guardian of the Person and Estate of Mary Neville, a minor, do have and recover of and from the Defendants, Continental National Bank and Fred Birdsall, the sum of Three Thousand Three Hundred Eighty-six and 40/100 (3,386.40) Dollars, with interest,\* and costs taxed in favor of the Plaintiff.

JUDGMENT ENTERED FEBRUARY 8, 1922.

CHAS. N. WILLIAMS, Clerk

By Louis J. Somers

Deputy Clerk.

\*Amended per Minute

Order July 7 1922

[Endorsed]: No. 896 Civil. UNITED STATES DISTRICT COURT Southern District of California Southern Division. Kate Neville, Guardian of the Person and Estate of Mary Neville, a minor, Plaintiff, vs. Continental National Bank and Alfred W. Birdsall, Defendants. COPY OF JUDGMENT. Filed Feb 18 - 1922 Chas N Williams Clerk R S Zimmerman Deputy

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

Southern Division.

(Hon. Oscar A. Trippet, Judge.)

--- o ---

MARY NEVILLE,

Plaintiff,

vs

CONTINENTAL NATIONAL BANK, and FRED W. BIRD-SALL,

Defendants.

--- o ---

BE IT REMEMBERED that the above entitled action came on regularly for trial before the above

entitled court, Hon. Oscar A. Trippet, Judge Presiding, the plaintiff appeared by her attorneys Messrs Newby & Palmer, and George B. Ross, Esq., and the defendant, Continental National Bank, appearing by its attorneys, Messrs. Haas & Dunnigan, and the defendant Fred W. Birdsall not appearing either in person or by attorney:

BE IT FURTHER REMEMBERED, that thereupon a jury of 12 competent and qualified men were duly and regularly selected and empaneled to try the cause;

BE IT FURTHER REMEMBERED, that thereupon the following evidence was introduced and the following proceedings were had:

MARY NEVILLE, Plaintiff in the action, called as a witness in her own behalf, testified as follows:

My home is in Alpine, Texas. I was 20 years old on the 30th of October last.

Q Miss Neville, where did you first meet A. W. Birdsall or Fred Birdsall?

MR. DUNNIGAN: That is objected to as incompetent, irrelevant and immaterial. The question here is the title to this money, and the misconduct, if any, by Mr Birdsall, seems to me cannot be an issue. The result would be the same whether this money came into his possession by aggravated, wrongful acts, or otherwise. The only issue is whether the money deposited in this bank was his money or her money, and whether it was deposited with her consent or not, if she could give consent, and whether it has been



(Testimony of Mary Neville.)

paid back properly, but how she became acquainted with him and matters of that kind it seems to me are entirely irrelevant.

MR. PALMER: We have pursued him and he has answered and the case is set for trial, and we are now proceeding with the trial and we are asking judgment against him and also against the bank. It doesn't make any difference whether he is represented in court or not, we are entitled to introduce our proof and get our judgment against him.

MR. DUNNIGAN: That would be entirely true, your Honor, but the history of their acquaintance would not have any bearing upon the title to the money.

THE COURT: I will hear some of it anyway. Who filed the answer for the defendant?

MR. PALMER: Messrs. Davis, Rush and Macdonald appeared for the defendant, your Honor.

THE COURT: They are not present here, this morning?

MR. PALMER: No sir. I know that they knew of the trial, I don't know that we have served a written notice on them.

THE COURT: I will overrule this objection. I don't know how far I will let the matter go. This question cannot do anybody any harm and it may be relevant.

A In Long Beach. I afterwards returned to Texas

(Testimony of Mary Neville.)

with my mother and sister and a friend of ours. We returned in an automobile.

I met Birdsall in Texas and contracted a marriage with him there. We were regularly married and we came back out here and stayed about a month. We first went to the Lankershim Hotel and then moved from there to the Stillwell Hotel. We were married on September 9th, 1920.

I afterwards separated from him when he was arrested, which I think was on the 8th of October, 1920, in San Francisco.

When I was living in Los Angeles mother sent me two checks, and there was an automobile given to me by Mr Selover. I got the first check soon after I came out here, I think.

Q I show you a paper, Miss Neville, and will ask you if that is the first check you speak of that you received from your mother (showing paper to the witness)?

A Yes sir, my mother sent it to me through the mail. It is signed 'Kate Neville', that is my mother.

I endorsed the check and gave it to the defendant Birdsall, to deposit in the Continental National Bank for me."

The check was here introduced, received and read in evidence as Plaintiff's Exhibit 10, and is in the words and figures following, to-wit:

"Alpine, Texas, September 14, 1920. First National Bank. Pay to Mary Neville Birdsall, or order, \$500,

(Testimony of Mary Neville.)

Five Hundred Dollars." Signed "Mrs. Kate Neville." Endorsed "Mary Neville Birdsall." "Pay to Federal Reserve Bank of San Francisco or *oder*. Prior endorsements guaranteed, September 21, 1920. The Continental National Bank, Los Angeles, Cal., W. D. Howell, Cashier."

"Q Now, after you delivered that check to him did he bring you back a pass book?

A Yes sir, a pass book and a card to sign, I did not sign that card and it later disappeared. The bank book that he brought back to me had the \$500 entry in it. It had my name on it 'Mary Neville Birdsall.' It did not have Fred Birdsall's name on it.

Q I show you this book, which is plaintiff's Exhibit 7 for identification and will ask you whether or not you can tell whether that is the book that your husband brought to you or that Fred Birdsall brought you after you gave him this check (handing book to the witness)?

A No sir, I cannot tell. The book that he brought me did not have his name on it. He was known to me at that time by the name of 'Fred Birdsall'. He said his name was really Alfred Ward Birdsall, but when he went into the army they changed it to 'Fred Birdsall.' I went with him a few days later and signed another card.

Q When you went to the bank did he introduce you to anyone?

(Testimony of Mary Neville.)

A He introduced me to Fred Nichols, who he said was president. Mr. Nichols just spoke to me, I suppose. He presented me with a card at that time to sign. He gave me another card and I signed that one.

Q I show you this paper (handing paper to witness) Is that the card you signed at that time?

A Yes sir.

Q The card was here offered and received in evidence and is in the words and figures following to-wit:

“Authorized signature of \_\_\_\_\_ individual  
for the Continental National Bank of Los Angeles.  
Sign here.

Mary Neville Birdsall. (Signed.)

Address, 1015 M- S- Bldg.

Business

Introduced by

Accepted by

Dated, 9-21 1920. Remarks: F. H. N.

Form, 209. 2-4-20. 2 M.”

“MR. PALMER: Is that your signature there (indicating)? You signed that?”

A Yes. At the time I signed that card I did not see Fred Birdsall sign a card. I did not then see a card that he had signed. I afterwards saw it in the bank later, on October 14th, after we had separated. I afterwards saw it in the Federal Grand Jury room.

MR. PALMER: I show you this card and will ask you first if you have seen Fred Birdsall write?

(Testimony of Mary Neville.)

A Yes sir, I have seen him sign his name. I am familiar with it. I know his signature when I see it. That is his signature. That is the card that Mr. Nichols showed me in the bank on October 14th."

The card was then received in evidence as Plaintiff's Exhibit 9-b, and was handed to the jury for inspection and is in the words and figures following, to-wit:

"Authorized signature of \_\_\_\_\_ individual.

For the Continental National Bank of Los Angeles.

Sign here: Fred Birdsall. \_\_\_\_\_ or

Address, 1015 Marsh Strong Building.

Business:

Introduced by F. H. N. 1      Accepted by

Date 9-21-1920.      Remarks F. H. N.

Form 209    2-4-20    2M"

"Q Now after that time did you get another check payable to you, the next one I mean?

A Yes sir, from Mr. Selover, for \$2500. That was made payable to me. It was the price of an automobile. He handed it to me and I took it down to the bank that same afternoon and deposited it.

I did not make out a deposit ticket. Birdsall did. The deposit ticket was made out in my name. It did not have his name on it. I endorsed that \$2500 check, wrote my name on the back of it. I did not see him write his name on the back of it. I did not know of his putting any money in there at that time.

Q I show you this paper and ask you if you have seen that before?



(Testimony of Mary Neville.)

A Yes sir, I received it from my mother. That is signed by my mother and endorsed by me. All of that handwriting on there is my handwriting.

Q For deposit only."

The check shown the witness was here received in evidence and as plaintiff's exhibit 11 and was read to the jury and is in the words and figures following, to wit:

Alpine, Texas, Sept 25 1920 No.—

THE FIRST NATIONAL BANK. 88 - 467

Pay to Mary Neville Birdsall or order \$500.00.

Five Hundred - - - - - Dollars.

For ————— (N. P.

(16-78) (1)

FIRST NATIONAL BANK. Alpine, Texas

PAID Oct 8 1920.

Endorsement:

For deposit Only, Cont'l Nat'l Bank, Mary Neville Birdsall

PAY TO THE ORDER OF ANY BANK, BANKER OR TRUST CO. Prior endorsements Guaranteed Oct - 7 1920 LOS ANGELES BRANCH 16 - 16 FEDERAL RESERVE BANK OF SAN FRANCISCO 16-16

Pay to the Order of any Bank or Banker

Prior Endorsements Guaranteed EL PASO BRANCH FEDERAL RESERVE of Dallas, FL PASO, TEXAS."

(Testimony of Mary Neville.)

“Q Did you know about Fred Birdsall ever paying any money into the Continental National Bank?

A The only thing I know is that he told me he moved his Long Beach account up there to the Continental National Bank. He formerly lived in Long Beach.

Q Did you at any time have your address at 1015 Marsh Strong Building?

A That is where my mother sent my mail. That was Mr. Strong's office. Mr. Birdsall was connected with that office in the real estate business. It was the office of Strong, McGrath & Sullivan.

Q I show you, Miss Neville, a number of checks.

MR. DUNNIGAN: I am prepared to stipulate that those checks were signed by the two parties as they appear to be signed and cashed by the bank, if that will shorten the examination any.

MR. PALMER: Out of that one account.

MR. DUNNIGAN: Well, the checks speak for themselves. I don't suppose you want to go into how the bank credited them, but that the checks were paid by the bank and credited to the parties who signed them or their orders. Of course the issue is what account they should be charged to. I am not asking you to stipulate to that but I will stipulate that those checks were signed and that the bank paid them.”

The checks were then received in evidence and read to the jury as Plaintiff's Exhibit 5 and are in the words and figures following:

CONTINENTAL NATIONAL BANK 16-78

of Los Angeles

(CUT) LOS ANGELES Sept 21 1920

PAY TO THE ORDER OF C. H. WOLFELT  
CO \$53.15 Fifty Three Dollars and 15-100 DOL-  
LARS

No.

Mary Neville Birdsall.

- - - - -

(Endorsement on back:)

MERCHANTS NATIONAL BANK, Through Los  
Angeles Clearing House. Sep 23 1920 1015 Marsh  
Strong Bldg. 671 Pay to the order of Merchants  
National Bank, Los Angeles, Cal. THE BOOTE  
C. H. Wolfelt Co. 6

CONTINENTAL NATIONAL BANK 16-78

of Los Angeles.

LOS ANGELES Sept 22 1920

PAY TO THE ORDER OF N. B. Blackstone \$7.50

No. SEVEN 50-100 - - - - - DOLLARS.

Mary Neville Birdsall

(Endorsement on back:

Pay to the Order of Merchants National Bank  
Los Angeles, Cal. Sep 23 1920 N. B. Blackstone  
Co. Los Angeles 101 Merchants National Bank  
Through Los Angeles Clearing House Sep 24 1920  
#60195 1015 Marsh Strong Blding L A C

OK U.H.M.

CONTINENTAL NATIONAL BANK 16-78

of Los Angeles.

(CUT) Los Angeles Sept 2nd 1920

PAY TO THE ORDER OF N. B. Blackstone Co.

\$52.95-100 Fifty-two - -95-100 - - DOLLARS

No. 3

Mary Neville Birdsall

1015 Marsh Strong Bldg.

(Endorsement on back:)

Pay to the order of Marchants National Bank Los Angeles, Cal. Sep 23 1920 N. B. Blackston Co. Los Angeles 101 60195 Merchants National Bank Throgh Los Angeles Clearing House. (Signature not legible.) Sept 24, 1920.

---

CONTINENTAL NATIONAL BANK 16-78

of Los Angeles.

LOS ANGELES Sept 22 1920

PAY TO THE ORDER OF N. B. Blackstone Co.

\$202.00 Two Hundred and Two - - - 00-100

DOLLARS.

Fred Birdsall

No.

1015 Marsh Strong Bldg.

(Endorsement on back:)

Pay to the order of Merchants National Bank Los Angeles, Cal. Sep 23 1920 N. B. Blackstone Co. Los Angeles 101 Merchants National Bank Through Los Angeles Clearing House Sep 24 1920 Boyl 9-20-20 2401.

---

CONTINENTAL NATIONAL BANK 16-78  
of Los Angeles

(CUT)

Los Angeles Sept. 22nd 1920

Pay to the order of S. Nordlinger &amp; Sons \$9.00

Nine - - - - - - - - -oo - 100 - -DOLLARS.

No.

Fred Birdsall

(Endorsement on back:)

52 Pay to the order of Farmers & Merchants Na-  
tional Bank Los Angeles, Cal. S. Nordlinger & Sons.  
Farmers & Merchants National Bank of Los Angeles  
Pay through Clearing House only No. 1 Sept 24  
1920 C E M 417 So St Andrews.

---

CONTINENTAL NATIONAL BANK  
of Los Angeles.

Los Angeles, Cal Sept. 22nd 1915

Pay to the order of Olive St Garage \$5.20

Five - - - - - - - - - DOLLARS.

No.

Fred Birdsall.

(Endorsement on back:)

Pay to the Order of Bank of Italy, Los Angeles,  
Cal. Olive Street Garage Citizens National Bank  
66 Sep 23 1920 Los Angeles Pay through Los An-  
geles Clearing House Bank 20 of Italy.

---



CONTINENTAL NATIONAL BANK 16-78

(CUT) of Los Angeles.

Los Angeles, Cal. Sept 24 1920

Pay to the order of CASH - - - - - \$25.00

Twenty-five and 00-100 - - - - - DOLLARS.

No.

Fred Birdsall.

(Endorsement on back.) (None.)

---

CONTINENTAL NATIONAL BANK 16-78

of Los Angeles.

Los Angeles, Cal. Sept 25th 1920

Pay to the order of N. B. Blackstone Co. \$26.95

Twenty-six - - - - - 95-100 DOLLARS.

No.

Fred Birdsall.

(Endorsement on back:) Pay to the order of Merchants National Bank Los Angeles, Cal. Sep 27 1920 N. B. Blackstone Co. Los Angeles 101 Merchants National Bank Through Los Angeles Clearing House Sep 28 1920 1015 Marsh Strong Bldg.

(Signature not legible.)

---

CONTINENTAL NATIONAL BANK 16-78

of Los Angeles.

(CUT)

Los Angeles, Cal. Sept 27 1920

Pay to the order of CASH \$25.00

Twenty-five - - - - - -00-100 - - DOLLARS.

No. 21

Fred Birdsall.

(Endorsement on back:)

Pay to the order of Bank of Italy Los Angeles,  
Cal. The Stillwell Hotel Citizens National Bank  
66 Pay through Los Angeles Clearing House Sep  
28 1920 Bank 20 of Italy.

CONTINENTAL NATIONAL BANK 16-78  
of Los Angeles.

(CUT)

Los Angeles, Cal Sept 27th 1920  
Pay to the order of Skinner & Co. \$2.50  
Two - - - - 50-100 DOLLARS.  
No. 22

Fred Birdsall.

(Endorsement on back:)

Pay to the order of Security Trust & Savings Bank  
Los Angeles, Calif. Skinner & CO. Security Trust  
& Savings Bank. Pay Farmers & Merchants Na-  
tional Bank Sept 29 1920, 51 Through Clearing  
House only 51 Los Angeles, Cal.

CONTINENTAL NATIONAL BANK 16-78  
of Los Angeles.

(CUT)

Los Angeles, Cal. Sept 27th, 1920.  
Pay to the order of Olive St. Garage, \$7.90  
Seven - - - - 90-100 - - DOLLARS.  
No. 25

Fred Birdsall.

(Endorsement on back:)

Pay to the Order of Bank of Italy Los Angeles,  
Cal. Olive Street Garage Citizens National Bank 66  
Pay through Los Angeles Clearing House Sep 29  
1920 Bank 20 of Italy.

---

CONTINENTAL NATIONAL BANK  
of Los Angeles.

(CUT)

Los Angeles, Cal. Sept 28th 1920

Pay to the Order of CASH \$25.00

Twenty-five - - - (4) - - -oo-100 DOLLARS

No.

Fred Birdsall.

(Endorsement on back:)

Pay to the order of Bank of Italy Los Angeles,  
Cal. The Stillwell Hotel Citizens National Bank  
66 Pay through Los Angeles Clearing House Sep  
29 1920 Bank 20 of Italy.

---

CONTINENTAL NATIONAL BANK 16-78  
of Los Angeles.

(CUT)

Los Angeles, Cal. Sept 29th 1920

Pay to the order of CASH - \$25.00

Twenty-five - - - - -oo-100 DOLLARS

No.

Fred Birdsall.

(Endorsement on back:)

Citizens National Bank Pay to the order of Bank  
of Italy Los Angeles, Cal. The Stillwell Hotel. Citi-

zens National Bank 66 Pay through Los Angeles  
Clearing House Oct 1 1920 Bank 20 of Italy.

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CONTINENTAL NATIONAL BANK  
of Los Angeles.

(CUT)

Los Angeles, Cal. Sept 29th 1920

Pay to the order of Southern Pacific R. R CO.

\$400.73 Four Hundred and 73-100 - DOLLARS.

No.

Fred Birdsall.

CERTIFIED

(Across face of check:) Pay \$400 and 73 Cts. Good  
when properly endorsed Sep 29 1920 Continental  
National Bank Los Angeles, Cal By ...Asst. Cashier.  
(Endorsement on back:)

208-B Pay to the order of Farmers & Merchants  
National Bank of Los Angeles, Cal. Southern Pacific  
Co. M. L. Ryder, Agent Farmers & Merchants  
National Bank of Los Angeles Pay through Clearing  
House only Oct 2 1920 No. 1

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CONTINENTAL NATIONAL BANK 16-78  
of Los Angeles.

(CUT)

Los Angeles, Cal. Sept 30th 1920

Pay to the order of BULLOCKS \$308.45

Three Hundred and Eight & 45-100 DOLLARS.

No. 154

1015 Marsh Strong Bldg.

Fred Birdsall.

(Endorsement on back:)

-- 87 -- Pay to the order of First National Bank  
Los Angeles, Cal Bullock #88375 (in pencil): C.  
F. Kemp #6988 Paid Sep 16-30-16 1920 Bul-  
lock's (Stamp not legible).

---

CONTINENTAL NATIONAL BANK  
of Los Angeles.

(CUT)

Los Angeles, Cal. Oct. 1st 1920

Pay to the order of CASH \$25.00

Twenty-five - - - - - oo-100 - DOLLARS

No. 156

Fred Birdsall.

(Endorsement on back:)

Pay to the order of Bank of Italy Los Angeles,  
Cal. The Stillwell Hotel. Citizens National Bank  
66 Pay Through Los Angeles Clearing House Oct  
4 1920 Bank 20 of Italy.

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CONTINENTAL NATIONAL BANK 16-78  
of Los Angeles.

(CUT)

Los Angeles, Cal. Oct 1st, 1920

Pay to the order of Continental Nat'l Bank of LA  
\$900.76-100 Nine Hundred and 76-100 DOLLARS

No. 155 -

Fred Birdsall.

(Endorsement: None.)

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CONTINENTAL NATIONAL BANK 16-78  
of Los Angeles.

(CUT)

Los Angeles, Cal. Oct 2nd 1920

Pay to the order of Cash \$25.00

Twenty-five - - - - - 00-100 Dollars.

No. 159

Fred Birdsall.

(Endorsement:)

Citizens National Bank 66 Pay Through Los Angeles  
Clearing House Oct 5 1920 Bank 20 of Italy.

CONTINENTAL NATIONAL BANK 16-78  
of Los Angeles.

(CUT)

Los Angeles, Cal. Oct. 2nd 1920

Pay to the order of A. J. Warner \$150.00

One Hundred Fifty and 00-100 - - DOLLARS.

No. 158

Fred Birdsall.

(Endorsement:)

A. J. Warner Pay to the order of Guaranty Trust  
& Savings Bank Los Angeles Cal. A. J. Warner  
Tailoring Co. Guaranty Trust & Sav Bank 52 Oct  
4 1920 Pay through L. A. Clearing House only.

CONTINENTAL NATIONAL BANK 16-78  
of Los Angeles.

(CUT)

Los Angeles, Cal Oct 3rd 1920

Pay to the order of Hotel Stillwell \$36.21

Thirty-six - - - - - \$36.21

Thirty-six - - - - - 21-100 Dollars.

No. 160

Fred Birdsall.

(Endorsement:

Pay to the order of Bank of Italy Los Angeles, Cal.  
The Stillwell Hotel. Citizens National Bank 66 Pay  
through Los Angeles Clearing House Oct 5 1922  
Bank 20 of Italy.

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CONTINENTAL NATIONAL BANK 16-78  
of Los Angeles.

(CUT)

Los Angeles, Cal. Oct 4th 1920

Pay to the order of The Continental National Bank  
Los Angeles, Calif.

\$2000.00 Two Thousand - - 00-100 Dollars.

No.

Fred Birdsall.

(Endorsement: None.)

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CONTINENTAL NATIONAL BANK 16-78  
of Los Angeles.

(CUT)

Los Angeles, Cal. Oct 4 1920

Pay to the order of Continental Nat'l Bank \$35.00

Thirty-five - - - - - 00-100 Dollars

No. 164

Fred Birdsall.

(Endorsement: None.)

CONTINENTAL NATIONAL BANK 16-78  
of Los Angeles.

(CUT)

Los Angeles, Cal. Oct. 4th 1920

Pay to the order of Hotel Alexander \$25.80

Twenty-five - - - - 80-100 - - DOLLARS.

No.

Fred Birdsall.

(Endorsement:)

Pay to the order of Exchange Nat'l Bank Long  
Beach, Cal. Alexander Hotel S. W. Alexander

Pay only through L. A. Clearing House Oct 6 1920

Los Angeles Branch 1616 Federal Reserve Bank of  
San Francisco 16-16 Pay any bank or banker or

order, previous endorsements guaranteed 90-116 Oct

4 1920 90-117 2 Exchange National Bank Long  
Beach Cal W. J. Gardiner, Cashier.

CONTINENTAL NATIONAL BANK 16-78  
of Los Angeles.

(CUT)

Los Angeles, Cal. Oct 4th, 1920

Pay to the order of CASH \$10.00

Ten - - - 00-100 - - - - DOLLARS.

No. 162

Fred Birdsall.

(Endorsement:)

Pay to the order of Bank of Italy, Los Angeles,  
Cal. The Stillwell Hotel Citizens National Bank 66

(Testimony of Mary Neville.)

Pay Through Los Angeles Clearing House Bank 20  
of Italy.

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CONTINENTAL NATIONAL BANK

of Los Angeles.

(CUT)

Los Angeles, Cal. Oct. 5th, 1920

Pay to the order of Hotel Stillwell \$6.05

Six - - - - - 05-100 Dollars.

No. 165

Fred Birdsall.

(Endorsement)

Pay to the order of Bank of Italy Los Angeles, Cal.  
The Stillwell Hotel. Citizens National Bank 66 Pay  
through Los Angeles Clearing House Oct 7 1920  
Bank 20 of Italy.

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“Q BY MR. PALMER: Did you at any time go  
to the bank to inquire about the state of your ac-  
count?

A Yes sir, October 14, 1920, with my mother, Mr.  
Alexander and Mr. Hall. The day before I was talking  
to Mr. Birdsall and told him I was going down to  
see about my account. He was in Mr. Strong's office.  
They had just brought him back from San Francisco.  
He said, well, that I would find it \$500 short, that he  
drew that out to pay a lawyer in San Francisco to  
get him out on habeas corpus and I asked him if

(Testimony of Mary Neville.)

they would cash his check on my account, and he said yes, and I *thoug* thought that was funny, so I went down next morning to see about it.

I had never given him permission to draw checks on my account.

I never told any member of the bank or any one, that they might cash his checks drawn on my account. I did not know that he was drawing checks against my account and that the bank was paying them out of my account until that day, until he told me about the \$500.

After he told me that I went to see the bank, with my mother, Mr Alexander and Mr Hall. Mr. Hall was a Federal Investigator. I had a conversation with Mr. Nichols, the president of the bank, with regard to the account. I think Mr. Hall was the one that we had come to see about it, and he said that the money was all gone, Mr. Birdsall had already sent in more checks than they had money for and said it was a joint account, and I told him I didn't know that it was a joint account and that I had always thought until then that it was my own personal account, and that Birdsall had told me it was.

Q Did you have any talk authorizing your husband to draw a check payable to Nordlinger, for a present, or something of that kind?

A Yes. We were buying a present for one of his friends, bankers, and he wanted me to write the check



(Testimony of Mary Neville.)

and I told him no, that I was not making the present, that I didn't know the people.

Q BY MR. PALMER: Did you ever see the pass book on which deposits are entered that was issued by the bank to you after the time Birdsall brought it to you with your name on it alone and this first \$500?

A The second time I saw it was when I went to the bank to see about my account, on the 14th of October, with my mother, Hall and Alexander. At that time the name 'Fred Birdsall' was on the books. That is the last time I was there after he had been arrested. At that time the book was like it is now. I never saw it before when the name 'Fred Birdsall' was on it until the 14th of October. I didn't know that it was on there before that. I did not authorize the bank to put that on, or anybody at the bank to do it."

The bank book referred to and shown the witness was here received in evidence and read to the jury as plaintiff's exhibit 7, and is in the words and figures following, to-wit:

Dr.

CONTINENTAL NATIONAL BANK

Los Angeles, Calif. Fred Birdsall Cr.

In Account with or Mary Neville Birdsall.

1920

Sept 21 FHN 500. - - - -

(Testimony of Mary Neville.)

Oct	1	FHN	2500	----	
Oct	4	20	H	500	----
Oct	4	20	H	500	----
Oct	18	1920	BALANCE	9.85	

“Q You did not go to the bank and put the \$500 in on October 14th, did you?

A No sir, I delivered that to Fred Birdsall.

Q Tell the jury now whose automobile it was that was sold?

A My mother’s.”

It was here stipulated that the price of the automobile belonged to the plaintiff.

MR DUNNIGAN: The check was hers. Unless she parted with it it would be her money.

#### CROSS-EXAMINATION

Q Referring to the first check, dated September 14, which you identified as having been endorsed by you, and which appears to have been deposited in the Continental Bank on the 21st of September, how long before the 21st of September, did you sign your name on the back of that check and hand it to Mr. Birdsall?

A I do not remember. I have no specific recollection of that.

Q How long after you handed the check to Mr. Birdsall did he come to you with the bank book and a card?

A I don’t remember. Oh, it was a few days later. I am sure about that.

(Testimony of Mary Neville.)

Q How long after he showed you the bank book and asked you to sign the card which you did not sign, did you go to the bank and sign the card?

A Two or three days later.

Q Do you know whether you signed the card in the bank before or after the 21st of September?

A No, but that is the date there.

Q You have no recollection of the date at all. How soon after you received the check did you hand it to Mr. Birdsall?

A I don't remember. I don't remember if I kept it a while. Mr. Birdsall brought me the signature card and the handbook at the hotel. He never brought me a card at Strong's office in the Marsh Strong Building, where I received my mail.

I was in the hotel when I gave him the first check. He brought the letter to me from the Marsh Strong Building. I was in Mr. Strong's office in the Marsh Strong Building many times.

Q Have you a personal recollection of any sums of money having been deposited to your credit other than the two checks of your mother for \$500 and the check that you received for the automobile for \$2500?

A No sir.

Q Those are the only sums you have *been* any knowledge of?

A Those are the only sums that I know about having been deposited in my bank.

Q BY MR. DUNNIGAN: You say that when

(Testimony of Mary Neville.)

the \$2500 was deposited in the bank you accompanied your husband.

A Yes sir.

Q Did you accompany him to the teller's window?

A Yes sir. It was not given to the president. The bank was closed. It was after hours. I knew Mr. Nichols and had met him before. I never talked to him but twice, only once before the trouble came up. He sat on the side of the bank where the officers have desks. It was on the opposite side of the bank that this \$2500 was turned into the bank. That is where the tellers' cages are. The teller took the check after hours. Mr. Birdsall did not have this book with him at the time. He got a deposit slip.

He made it out himself. I did not see it any more. He made out one and they gave him a duplicate. Up until then those were the only two occasions on which I was in the bank.

Q Do you recall purchasing anything about the 22nd of September at Blackstone's amounting to a couple of hundred dollars?

A Blackstone's?

Q Yes.

A Yes sir. Mr. Birdsall was with me and he drew a check at that time for \$202 to pay that bill. That was for clothes for me. I did not know that he was drawing it against this money that I had turned over to him.

Q Now on the same day that you drew a check

(Testimony of Mary Neville.)

for \$52.95 to Blackstone's. For your information it appears that Mr. Birdsall drew a check for \$202, and that you drew two checks, one for \$52.95 and one for \$7.50, and you were both there present when those checks were drawn.

A He was not there when I wrote that for \$7.50. All these checks were given for purchases by myself. He was there when I wrote the \$52.95 check, and I was there when he wrote the \$202 check.

Q Now again, on the 25th, Mr. Birdsall appears to have drawn a check to N. B. Blackstone & Company for \$26.96. Do you recall what that was for? Was it for some of your purchases?

A Yes sir. I didn't ask him to draw the check. He was with me when I made the purchase.

Q On the 20th of September, Mr. Birdsall seemed to have drawn a check on Bullock's for \$308.45. Do you recall that?

A Yes sir, that was for some trunks he bought.

#### REDIRECT EXAMINATION

BY MR. PALMER: At this time when you were in the bank after hours, when was that?

A That was the day we deposited the \$2500 check. He made out the slip. It was in my name. His name was not on it."

At this time the plaintiff offers and there was received in evidence three deposit slips as Plaintiff's Exhibit 12. Said deposit slips were in the words and figures following, to-wit:



Deposited with  
 CONTINENTAL NATIONAL BANK  
 OF LOS ANGELES

Los Angeles, Cal.

Oct 4, 1920

Fred Birdsall

	Dollars	Cts.
Gold		
Silver		
Currency		
Checks	500	00
Bk		
(1)		
Total	500	00
---	0	---

Deposited with  
 CONTINENTAL NATIONAL BANK  
 OF LOS ANGELES.

Los Angeles. Cal.

Oct. 1, 1920

Mary Neville Birdsall,

Checks	2500	00
(1) Total	2500	00

(Endorsed on back of slip &amp;, 867.77

--- 0 ---

Deposited with  
 CONTINENTAL NATIONAL BANK  
 OF LOS ANGELES

Los Angeles, Cal.

Fred Birdsall or  
 Mrs Mary Neville Birdsall.

Checks 500 --

(Testimony of Mary Neville.)

(Rubber stamp)

Paid Sep 21 1920

Continental National Bank

Los Angeles, Cal. Newy      Total

--- o ---

“Q BY MR. PALMER: Now, you were asked about your intent and purpose in coming to California. When you started to California you believed that you were the lawful wife of Fred Birdsall, didn’t you?”

A Yes sir.

Q And afterwards you learned that you were not his lawful wife, did you not?

MR DUNNIGAN: That is objected to as not the best evidence. The record is the best evidence and it calls for a conclusion of the witness.

THE COURT: It is agreed that Birdsall was not her husband.

MR. PALMER: We have the record of the proceeding in which the marriage was annulled in this county.

“Q You did bring an action against Birdsall to annul your marriage with him, didn’t you?”

MR DUNNIGAN: That is *object* to as immaterial.

THE COURT: The objection is overruled.

A Yes sir.

Q BY MR. PALMER: In this county?

(Testimony of Mary Neville.)

A Yes sir.

Q Now when you got those goods at Blackstone's, when Fred Birdsall drew a check there for \$202, was there anything said by him about whether or not he would buy your clothing?

MR. DUNNIGAN: That is objected to as immaterial.

THE COURT: Overruled.

A No. He said he would write a check. I did not see the check he wrote.

Q Now, on that same day I understand that you drew a check for goods there for \$52.95.

A Yes sir. I don't know how it happened. He was not present when I wrote the \$7.50 check. I was expecting him to pay for the \$202 worth of goods. I did not know that check was paid out of my account.

Q BY MR. DUNNIGAN: Did you at any time speak to any teller or any officer in the bank or give them any direction as to any of these deposits you have testified about?

A No sir. I never made out a deposit slip. I do not think there was anything said by Mr. Birdsall in my presence at the bank, and in the presence of any teller, employe or officer of the bank respecting these deposits.

(Testimony of Kate Neville.)

KATE NEVILLE, a witness called on behalf of the plaintiff being first duly sworn, testified as follows:

My name is Kate Neville. I am the mother of Mary Neville just on the witness stand. I reside in Texas. I am her guardian in Texas. She became 18 years of age on October 30th, 1920. I am acquainted with Mr. Strong, that is, I have met him.

I went with my daughter to the bank after the arrest of Fred Birdsall to find out about her account. It was some time in October, 1920."

It was here stipulated that this visit was after the last deposit to the account in question, after the last check was put in.

THE WITNESS: Mr. Alexander, Mr. Hall and my daughter were with me. We saw Mr. Nichols.

Q And what if anything was said at that time about the account by Mr. Nichols.

A Well, there was not very much said. Mr. Hall, I believe, talked to him and he informed us that the money was all gone and that Mr. Birdsall had checked it out and had turned in more checks than they had money there; that it was a joint account, I believe. He also said that it was a joint account, I believe.

Q Did you hear Mary say anything to him there at that time about a joint account?

A Well, she didn't know. She said she didn't know that it was.

It was here stipulated that at that time the bank offered to honor Mary's check for \$9.85 or whatever

(Testimony of Maurice J. Wolfe.)

the balance showed, and that it was refused, and that the bank refused to pay more than \$9.85 but that it offered to pay that.

The plaintiff here rested her case

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“MAURICE J. WOLFE, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

My full name is Maurice J. Wolfe. I am assistant cashier of the Continental National Bank. In September and October of 1920 I was auditor.

Q I will ask you if you ever made an examination of the records of the bank with respect to any account which it may at any time have had after the first of the year 1920, or at any time as a matter of fact, with Mary Neville Birdsall, Fred Birdsall, and jointly as between the two?

A I have.

Q Has the bank ever had upon its books any account with Mary Neville Birdsall alone?

A No, they have not.

MR. PALMER: We object to that, if the court please, as irrelevant and immaterial. The bank has no right to take the check of Mary Birdsall, payable to her, and endorsed by her only, and open an account with that check with any one else or in any one else's name without her authority, and we object to their putting in testimony here to show how they have manufactured a defense.



(Testimony of Maurice J. Wolfe.)

MR. DUNNIGAN: I don't think counsel should use the expression in the presence of the jury that we have manufactured a defense.

MR. PALMER: I will withdraw that.

MR. DUNNIGAN: Counsel did not mean it but I do not think that it ought to go without challenge. The testimony is negative, if your Honor please, and this is only a officer of the bank, and the regular books of the bank and their condition is always competent evidence. As to the right of the bank to accept a check in the possession of Mr. Birdsall and properly endorsed, although originally payable to Mary Neville Birdsall and treated as Mr. Birdsall's property, I think there is no question. Our Code provides that a minor may pass title by endorsement to a negotiable paper, and I know of not criticism of that code section in the authorities; so that if this check were presented Mr. Birdsall was ostensibly the owner of it and held the legal title to it under the testimony at least of Mary Birdsall, because she said she endorsed it and delivered it to him, and a secret instruction would not bind the bank. Now if that account was opened in that way and if that instruction was given, neither the deposit slip nor the bank account nor the bank book nor the signature card nor any one of these circumstances would be conclusive. I think there is hardly any question about that being the law. The real question is what was the agreement between the bank and Mr. Birdsall when he made that deposit,

(Testimony of Maurice J. Wolfe.)

and the deposit slip and the bank book and the signature card are merely fragmentary pieces of evidence establishing that agreement, but the basic thing for the jury to decide is what was the agreement. Now the books of the bank are a circumstance as to what was done and what was the agreement. They are one circumstance along with the rest. The testimony we have is negative. I am not asking him for the contents of an account that he hasn't brought here, but as to whether the account existed. That is negative testimony and has to come in this way. If those accounts did exist I want to produce the record.

THE COURT: It seems to me that it is a self-serving declaration on the part of the bank. Unless the plaintiff knew about it, knew the condition of the books, it would not be receivable in evidence, it seems to me, except upon the theory that this is an account existing between the parties, and you say you are seeking to prove that there was no account.

MR. DUNNIGAN: I am asking if the books showed an account, not if there was an account. That would be a conclusion. I am asking as to whether the bank books showed an account. That is not conclusive on anybody. Now the plaintiff doesn't say she ever made a single deposit.

MR. PALMER: Oh, yes.

MR. DUNNIGAN: No; I appeal to the record on that. She was there only once when a deposit was made --

(Testimony of Maurice J. Wolfe.)

MR. PALMER: Oh, yes.

MR. DUNNIGAN: But she didn't speak to any one and didn't make out the ticket and didn't do anything.

THE COURT: I will sustain the objection.

MR. DUNNIGAN: I desire to prove by this witness that the bank books or the regular books of account of the bank contained no account with Mary Neville Birdsall or with Fred Birdsall or any other account excepting the account with Mary Neville Birdsall or Fred Birdsall -- or, rather, the reverse, Fred Birdsall or Mary Neville Birdsall -- and that that was the only account on the books of the bank so far as those books show.

THE COURT: I will sustain the objection.

MR. DUNNIGAN: All right. I understand that all exceptions are deemed to be taken.

THE COURT: You must take your exceptions.

MR. DUNNIGAN: Then I desire to reserve an exception to the Court's ruling. It does not seem necessary, and I do not desire to be impertinent and don't want to be in that position.

Q Have you the original book of account of the bank with Mary Neville Birdsall and Fred Birdsall?

A I have a copy as well as the original. This is the original ledger sheet.

Q I will ask you if you can identify the original deposit ticket that corresponded to the first deposit.

(Testimony of Maurice J. Wolfe.)

Have you those other two deposit tickets we had there this morning?

A I have the other, yes.

THE CLERK: It is a part of plaintiff's Exhibit 12.

A This deposit slip is in the handwriting of Don Curran, note teller at the Continental National Bank."

The deposit slip was here received in evidence and read to the jury as defendant's Exhibit A.

"Deposited with  
CONTINENTAL NATIONAL BANK  
OF LOS ANGELES.

Los Angeles, Cal.

Sept 29 1920.

Fred Birdsall,

---

	Dollars	Cts.
Gold		
Silver		
Currency		
Checks		
Bk	400 - -	"

"The next item is the slip of October 1, 1920, that has been introduced in evidence, reading to Mary Neville Birdsall, and that was credited on the bank's books to the account which you have just shown me of - - Fred Birdsall or Mary Neville Birdsall.

MR. DUNNIGAN: The next are two slips of October 4; one has already been introduced in evidence being for \$500 in the name of Mary Neville Birdsall, and the other - -

MR. PALMER: Is in Fred's name. All right. I don't care to see it.



(Testimony of Maurice J. Wolfe.)

MR. DUNNIGAN: That is dated October 2, 1920, deposited to the credit of Fred Birdsall, \$500.

Q Now that was entered under what date?

A The 4th. Those are all the deposits to that account.

Q I will ask you to examine these checks and see if the checks shown in that list were cashed by the bank. I am referring now to plaintiff's Exhibit 5 (handing checks to the witness)?

A These were all cashed by the bank, or rather, paid by the bank. They were charged to the joint account.

Q In addition to that I will show you another check and ask you if it was charged to the same account.

A This is a certified check. It belongs to the bank. It was charged originally to the account, that is, it was charged against our own records after it came back. It was charged originally to the account at the time the purchase was made.

MR DUNNIGAN: It is charged to the account when it is issued.

Q It is entered on the account?

A Originally, yes. We have it under date of September 29.

MR. PALMER: All right, go ahead and read it.

MR. DUNNIGAN: "Continental National Bank. Los Angeles, Cal., September 29, 1920. Pay to the order of Southern Pacific Company Four Hundred Dollars & 73 cents (\$400.73). Fred Birdsall."



(Testimony of Maurice J. Wolfe.)

Stamped across the face: 'Paid \$400.73.' Certified: 'Good when properly endorsed; September 29, 1920; No. 4484, Continental National Bank, Los Angeles, California, by' - -

MR. DUNNIGAN: Endorsed on the back: '208 B. Pay to the order of Farmers & Merchants Bank, Los Angeles. Southern Pacific Company, M. L. Ryder, Agent,'

MR DUNNIGAN: Now, if the court please, I desire to offer in evidence the book account that the bank had against which these deposits were credited, showing the way they were entered on the bank's books and the way the checks were drawn. Any objection?

MR. PALMER: No, I guess not."

Defendant's Exhibit B was received in evidence and handed to the jury for inspection and is in the words and figures following to-wit:

"SHEET CONTINENTAL NATIONAL BANK

NO.

Los Angeles, Cal.

SIGNATURE.

NAME FRED BIRDSALL OR

MARY NEVILLE BIRDSALL

ADDRESS .....

OLD

BALANCE DATE CHECKS.

Balance Brought Forward.

---

500.00	Sep 23	53.15 -	
446.85	Sep 24	7.50 -	202.00 - 9.00
	Sep 24	52.95 -	

175.40	Sep 24	25.00 -		
150.40				
150.40	Sep 25	5.20 -		
145.20	Sep 28	26.95 -	25.00 -	
93.25	Sep 29	25.00 -		
68.25	Sep 29	2.50 -	7.90 -	
57.85	Sep 29	400.73 -		
57.12	Oct 1	25.00 -		
32.12				
2,532.12	Oct 2	900.76 -		
1,631.36	Oct 4	150.00 -		
1,481.36	Oct 4	308.45 -	25.00 -	
2,147.91	Oct 4	2,000.00 -	35.00 -	
112.91	Oct 5	10.00 -	36.21	25.00
41.70	Oct 6	25.80 -		
15.90	Oct 7	6.05 -		

DATE	1920	DEPOSITS	DATE	BALANCE.
Sept 21		500.00	Sep 21	500.00
Sep 23			Sep 23	446.85
Sep 24			Sep 24	175.40
Sep 24			Sep 24	150.40
Sep 25			Sep 25	
			Sep 25	145.20
Sep 28			Sep 28	93.25
Sep 29			Sep 29	68.25
Sep 29		400.00	Sep 29	57.85
Sep 29			Sep 29	57.12
Oct 1			Oct 1	32.12

(Testimony of Maurice J. Wolfe.)

Oct 2	2500.00	Oct 2	2,532.12
Oct 2		Oct 2	1,631.36
Oct 4		Oct 4	1,481.36
Oct 4	500.00	Oct 4	
Oct 4	500.00	Oct 4	2,147.91
Oct 4		Oct 4	112.91
Oct 5		Oct 5	41.70
Oct 6		Oct 5	15.90
		Oct 7	9.85

## CROSS-EXAMINATION

BY MR. PALMER:

Q You have no knowledge at all about the method or about who came to open the account there, have you?

A No sir, not any personal knowledge.

Q Nor what was said at the time?

A Not personally.

Q When did you first see this deposit ticket that was made out in the name of Fred Birdsall or Mary Birdsall?

A Well, that is a pretty hard question to answer. My work is such that I may have passed that thing by fifty times. I first remember seeing it along about October 15th or 16th. It was called to my attention by a request that we produce the various evidence for the trial that was to come or the trouble that was coming up. I don't recall exactly. I remember Mary Birdsall came down there and raised a question as to

(Testimony of Maurice J. Wolfe.)

whether there was a joint account. I do not recall the date. I know it was on a Saturday and was talked to me personally. I do not know what was said when the deposit ticket was prepared, or who was present. We have various departments in the bank and the New Account Department would handle new accounts. In the absence of the New Account Department one of the senior officers would take care of the accounts. The deposit ticket was written by Mr. Nichols. He was the president of the bank at the time. I am judging from the appearance of the handwriting. That is all I know about it.

FRANK H. NICHOLS, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

My name is Frank H. Nichols. My present occupation is chairman of the State Federations Welfare Board. In October and September 1920, I was president of the Continental National Bank. I recall opening an account with that bank by Mr. Birdsall.

MR. DUNNIGAN: I show you a deposit slip with a stamp on it, the slip itself not being dated. It is not marked on the back. It is the first slip in date, and it is a part of your exhibit. It is a September 21st deposit. In whose handwriting is that (handing paper to the witness)?

A Mine. I remember the circumstance. Mr. Birdsall was present. He wanted it entered as a joint account with his wife, Mary Neville Birdsall.

(Testimony of Frank J. Nichols.)

Q I show you a pass book marked Defendant's Exhibit No. 7 in this case, and ask you in whose handwriting the upper portion of the names of the depositors is entered?

A It is mine. The first entry in that book of \$500 on September 21, is in my handwriting. It was made out on September 21. Mary Neville was not present. I prepared a signature card at the time.

Q I will show you Plaintiff's Exhibit 9-B and ask you if you recognize it?

A I do. I will say the signature on there is that of Fred Birdsall. The balance of the card is in my handwriting, including the date. I don't know what kind of an item the \$500 represents.

Q Do you remember whether or not Mary Neville Birdsall or Mary Neville came into the bank and turned in a signature card?

A I don't recall whether she turned it in or he.

Q I show you a signature card, exhibit 9-A and ask you if you --

A Everything written on there, aside from the signature, is my writing. The signature is her's.

Q I show you a deposit ticket for \$2500 that has been introduced in evidence here and ask you to refer to the deposit book and see whether you received that deposit or not (handing paper to the witness)?

A I did. I received it from Mr. Birdsall. I made the entry in the book. He presented it to me at the time. The Plaintiff was not present at the time, that



(Testimony of Frank J. Nichols.)

is, now, I am not going to say positively. I never saw her but once, at the time of this trouble.

Q That is, up prior to the time she called there with several other gentlemen and questioned the action of the bank, how many times had you seen her?

A Once. Mr. Birdsall brought her in.

Q What was the purpose of the visit or the subject of the conversation, if any?

A He introduced her to me, and I think that is when the signature card was handed in, but I am not positive as to that.

Q Can you tell from the book who took the other three deposits here? You say you took the first and the other \$2500 (handing book to the witness).

A No other deposits are mine. I would say that Hall received one of them. He is a teller. It looks like his name, I don't know. I am not sure of their initials.

Q So far as you know was there ever more than one pass book issued?

A None other.

Q To Mary Birdsall or Fred Birdsall or either of them or with their names on it?

A None but the one to my knowledge.

Q That pass book, showing the depositors, Fred Birdsall and Mary Birdsall, were the words 'Fred Birdsall' written there after 'Mary Birdsall'?

A It was not. It was written at the time I delivered the book, at the time of the initial deposit. Mr.

(Testimony of Frank J. Nichols.)

Birdsall directed the entry of the account. He was the only one present when the account was opened.

Q No, I mean to the bookkeeper. What is the system of opening the account?

A Well, I would pass it in to one of the tellers. There was no direction. The deposit shows the disposition of the deposit.

Q Who in the bank has authority to accept new deposits, or had at that time?

A The officers, I think, were all. The tellers were not permitted to open new accounts. I never heard of any other account with these people. I gave directions for the opening of that account.

Q Do you recall whether or not there was an error in the title on the ledger sheet that is in evidence here, that has been shown here?

A Well, I have heard that the bookkeeper placed the word 'and' instead of 'or'. I don't know that I saw it, but I heard that he did. I always use 'or' in opening all joint accounts.

I have been in the banking business over 16 years and in this city 13 years. I was cashier for the California Savings for 10 years and of the Continental for 3 years - - or president of the Continental two years and a half.

Q Are you able to state whether it was customary in all cases of joint accounts to have both signatures on the same card?

A It is not.

(Testimony of Frank J. Nichols.)

Q I will ask you whether or not it is customary on deposit slips to always put your names on a joint card or a joint slip?

A It is not.

Q What is the custom as to depositing -- not in one bank alone, but is there a custom as to making deposits in joint accounts where the slip only contains one name of a depositor instead of both?

A It will be credited in the joint account.

Q Would the fact that there was or was not any other open account on the books of the bank have anything to do with that?

A Well, if I understand you, if there was a joint account and another account, the other would likely be under the name of one as 'special', or 'No. 2', or some word to designate that it was an individual account otherwise there would be confusion in the books.

Q I believe I asked you whether during the time this joint account was open, either of the parties had any other account with the bank?

A Not to my knowledge.

Q Did you make any investigation of that when that question came up?

A I did not.

#### CROSS-EXAMINATION

BY MR. PALMER:

Q Mr. Nichols, you say it is the custom of the bank not to have joint signature cards?

A I didn't say that; although we don't have joint

(Testimony of Frank J. Nichols.)

signature cards, we have what we call a power of attorney on the back of our cards, which, if I am permitted to explain, I will tell you why it is there and what use we make of it.

Q Did you prepare this for signature -- referring to exhibit 13 for identification?

A It seems to me that I did. There is nothing on there to indicate that I did. We use the blue and green stamp on there very frequently. There was not one on my desk but I knew there was one in the bank. This was used for making joint accounts or survivorship.

MR. PALMER: We offer in evidence, your Honor, Plaintiff's Exhibit 13 for identification as showing the stamp that was used by the bank where there was a joint account.

MR. DUNNIGAN: I have no objection to the stamp alone going in evidence, but I do object to the balance of the card being in evidence.

THE COURT: Will you read it?

MR. PALMER: 'Joint owners, subject to the order of either, the balance at the death of either to belong to the survivor,' and then two lines for signatures.

THE WITNESS: We had that stamp in September and October of 1920. They were frequently used but not always. I did not have one on my desk.

Q BY MR. PALMER: I show you this paper, Mr Nichols. Do you know what that is (handing witness defendant's Exhibit B)?

(Testimony of Frank J. Nichols.)

A That is the original ledger sheet of the bank.

Q And it shows an alteration, does it not here (indicating)?

A It looks like the word 'or' has been substituted and the word 'and' erased. On the corner of the sheet is written in pencil 'Fred Birdsall' and 'Mary Neville Birdsall', but I can explain that to you. Because these sheets originally - - the names are made out in pencil and then they are passed to the stenographer who writes in the name, and that is the names written in pencil by one of the clerks in the department. That is the pencil notation, and then they are passed to the stenographer and she writes in the name on the typewriter and erases the pencil.

Q BY MR. PALMER: Now you testified awhile ago that you didn't know either one of these parties having any other account in your bank. As a matter of fact Fred Birdsall did have another account, didn't he?

A I don't know of any.

Q Don't you know that he had an account of loans?

A He had no account of loans that I know of. I made him a loan but there was no account made of it that I know of. I made him a loan but there was no account made of it that I know of. I think he got a cashier's check, that is - - or one of them. I think I made him two loans. I think I made him a loan on September 29th, if this is the item I think it is,



(Testimony of Frank J. Nichols.)

\$400.73. I think he got the money to pay freight on an automobile. I don't know now that that is the particular loan, you understand. I have two loans and I can't tell them apart now. One of them was secured by Mr. Strong, Frank R. Strong. He was a stockholder and a director in the bank at that time. I think he is yet. He has offices at 1015 Marsh Strong Building. The loan secured by Mr. Strong, I think it was \$500, the first one I made. I don't remember about the second. But I am not positive as to that. I think it was \$400 or \$500. I do not know that the check of October 1st 1920 by Birdsall for \$900.76 was for a repayment of these loans.

Q Now when Mr. Birdsall came to you that first time to open an account he had a \$500 check, didn't he?

A He evidently had \$500. That is not indicated on the deposited slip, whether it was a check or which way. I don't know that I ever saw Plaintiff's Exhibit 10 before. I don't remember whether he brought me that check on September 14th to open that account.

I do remember very well that he brought a \$2500 check payable to Mary Birdsall and endorsed by Mary Birdsall. Perhaps I did not require him to endorse it. I deposited it in this account. That was the only account he had."

The witness was here shown Plaintiff's Exhibit 11.

Q I will now ask you if you saw that check before.

(Testimony of Frank J. Nichols.)

A I don't place it. I don't think I made out the deposit ticket on that, but I don't know.

Q Then if any check or deposit slip or anything of that kind came into your account after the joint account was opened, as you say, whether it was in the name of Fred Birdsall or whether it was in the name of Marv Neville Birdsall, you put all of it in the joint account?

A I would put it in the joint account without any statement or orders or anything of the kind. I would put it in the joint account unless there was a statement to the contrary, of course. The total amount placed in the joint account, according to the books, was \$4400. I do not know when the word 'or' was put in the book.

Q When the account was carried in the book under the name of Fred Birdsall and Mary Neville Birdsall that required the signature of both of them to a check to get the money out of it, didn't it?

A I wouldn't say so, and I don't know that it was every carried by the bank in that way. It should not have been. The direction was the deposit slip which I turned in. That is the initial deposit. That is the direction to the bookkeeper as to how the account is to be carried.

Q When an account in your bank is opened in the name of two people, one and the other, is it not a fact that you require the signatures of both to the checks?

(Testimony of Frank J. Nichols.)

A I never opened an account in that way and couldn't answer the question. I never do it. I always use 'or'.

Q You never had an account where two persons had to sign the check? Never heard of such a thing as that?

A Oh no, of course I have heard of such a thing, but then they are rare, very rare.

Q You never had any talk with Mary Neville, or Mary Neville Birdsall, in regard to this account until after the arrest of Fred Birdsall, did you?

A I can't say that I did. I don't think she gave me any direction in regard to it. She never gave me any writing in regard to it. She never told me to pay it out on the check of Fred Birdsall, and she never told me to open it in the name of Mary Neville Birdsall or Fred Birdsall. I never had any writing to that effect. I did not make a personal loan to Fred Birdsall. I did not loan him \$250. I knew that for a time Fred Birdsall was apparently selling real estate for Frank Strong. The other members of the firm were McGrath and Selover. I think Selover bought the \$2500 automobile. I do not know that he paid \$3000 for it.

#### REDIRECT EXAMINATION

BY MR DUNNIGAN:

Q Do you recall any conversation at the time the \$2500 was deposited as to the matter of the deposit? I am not asking you for your conclusion, but just

(Testimony of Frank J. Nichols.)

yes or no. Was there any conversation on the subject of the deposit?

A I cannot positively recall any. The bank book was presented to me at that time in connection with the deposit. No other book was presented. The entry was made in the presence of Mr. Birdsall in that book.

Q You spoke in your cross-examination of a stamp which was used in case of survivorship. Does a bank draw a distinction between deposits carrying a survivorship and deposits upon which either party may draw?

A Well, I can't say that we draw a distinction, but sometimes customers request that. They will ask that they be so deposited that it may be drawn by the other in the event of death, and while we don't enter into the matter of the law to change that, we use that stamp. The joint card was frequently used without the stamp.

Q BY MR. PALMER: Did you have any cards at all for a joint account?

A No, only what you see there. They all used the same card. We had no printed card for joint account other than what we wrote on them.

Q BY THE COURT: This initial deposit slip made September 4th, is that \$500 in your handwriting?

A Yes, that is my writing, and it says down here 'new'. That is mine, too. That means new account.



(Testimony of Frank J. Nichols.)

That is the direction to the bookkeeper to open a new account.

That initial deposit slip was not made in the name of Mary Neville Birdsall only. Both names have been written on it and the deposit book. The ledger sheet is written up from that ticket. The ticket goes back to the clerk in the Bookkeeper's department and the ticket states 'new', which means a new account, and therefore he would prepare a new ledger sheet for that account. The heading should be the same as the ticket.

Whereupon the defendant, Continental National Bank, rested its case.

That thereupon counsel for the plaintiff, in open court, waived any claim of the plaintiff to recover in this action any part of the deposit to said account amounting to \$400.00, and made on the 29th day of September, 1920, and waived the right to recover any part of one of the deposits amounting to \$500.00, made in said account on the 4th day of October, 1920.

That thereupon the cause was duly argued by counsel for plaintiff and defendant.

Whereupon the court instructed the jury as follows:

"THE COURT: Gentlemen of the jury, you are the sole judges of the facts in this case. I have a right to express my opinion concerning the facts and the credibility of the witnesses, but if I do express my opinion concerning the facts or credibility of the



witnesses you are not bound by my opinion but should exercise your own independent judgment. I state to you what the law is, and you are bound under your oaths to follow the law as I state it to you. You have no right to set up your own opinion as to what the law is as against what I say it is. If I state to you a proposition of law which is not the law, the Court of Appeals will set the proceeding aside, and therefore it is important that you follow the court's instructions as to the law.

The burden of proof is on the plaintiff. The plaintiff must prove her case by a preponderance of the evidence. Among the things that the plaintiff must prove is the fact that the money for which she sues was her separate property and that the deposits made in the bank were made for her sole use and benefit. A preponderance of the evidence is sustained when you are satisfied from the evidence that the weight thereof is with the plaintiff. You do not ascertain a preponderance of the evidence by the number of witnesses but by evidence which satisfies your minds that the preponderance is with the plaintiff.

When any deposit with a bank shall be made by or in the name of any married woman or minor the same shall be held for the exclusive right and benefit of such depositor and free from the control or lien of all other persons except creditors, and shall be paid, together with the dividends, if any, and interest, if any thereon, to the person in whose name the deposits shall have been made, and the receipt or acquittance

of such minor shall be a valid and sufficient release and discharge for such deposit or any part thereof to the bank. It is (unnecessary for the bank to know that a party is a minor. Every bank must take notice of the fact when a minor is dealing with them.

When a deposit with a bank shall be made by any person in the names of such depositor and other person or persons, and in the form to be paid to either, or the survivor or survivors of them, such deposit thereupon, and any additions thereto made by either of such persons, upon the making thereof, shall become the property of such persons as joint tenants, and the same together with all interest thereon, shall be held for the exclusive use of the persons so named and may be paid to either during the lifetime of any or all or to the survivors or the survivor after the death of one or more of them, and such payments and the receipt of acquittance to one to whom such payment is made shall be a valid release and discharge to said bank for all payments made on account of such deposits.

National banks are subject to the laws of the state and are governed in their daily course of business by the laws of the state when not in conflict with the laws of the United States. All their contracts are governed and construed by state law. Their acquisition and transfer of property, their right to collect debts and their liability to be sued for debts are all based on state laws. The state law is only void when it conflicts with the laws of the United States

and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies to discharge the duties for the performance of which they were created.

Any entry by a bank in a pass book of a depositor in the usual form crediting him with a certain sum deposited does not constitute a written contract between the parties but is merely evidence in the nature of a receipt for the deposit and may be explained or contradicted by oral testimony.

The obligation of the bank is not merely to use reasonable care to pay on the depositor's order and in accordance therewith; its undertaking and obligation are absolute that it will pay only in that manner. The absence of negligence on the part of the bank is wholly immaterial.

The usage of banks in respect to the powers and duties of its officers so far as such usage is known to the business public enters into and qualifies the contracts made by such banks through their officers. Custom and usage, if reasonable, have a binding force between the bank and the customer.

No estoppel arises where the representation or the conduct of the parties sought to be estopped is due to ignorance founded upon any innocent mistake. Knowledge of the truth as to the material facts represented or concealed is generally indispensable to the application of the doctrine of equitable estoppel unless the ignorance of the party against whom the estoppel is claimed was the result of gross negligence or other-

wise involves gross culpability, as where he is consciously ignorant of the facts at the very time of professing full knowledge of them.

If a man deposits money in a bank in his wife's name he has no right to check it out in his own name if it is her separate property, and if the bank pays her money out on his check it is liable to the wife for the money so paid out.

In an action by a depositor to recover money deposited in the bank and paid out by the bank on unauthorized checks, absence of negligence on the part of the bank is wholly immaterial. The obligation of the bank is not merely to use reasonable care to pay on the depositor's order and in accordance therewith, but its undertaking and obligation are absolute that it will pay only on the depositor's order.

This is an action prosecuted by the plaintiff to recover from the defendant Continental National Bank and Birdsall certain moneys alleged in the complaint to have been deposited with said defendant bank in the name of or for the account of plaintiff, Mary Neville Birdsall, or Mary Neville.

The complaint alleges that the aggregate amount of these deposits was \$4,400. The defendant Continental National Bank in its answer denies that any of such money was deposited to the account of the plaintiff Mary Neville Birdsall but said defendant bank alleges that said sums, aggregating \$4,400.00 were deposited by the defendant Fred Birdsall with said defendant bank to the joint account of said de-



fendant Fred Birdsall and said plaintiff Mary Neville Birdsall, and that it was by said deposit agreed that the said defendant bank should pay out of said account on checks signed by either the plaintiff or the said Fred Birdsall, and that it, the said defendant bank, has paid out upon checks so drawn all of said money except the sum of \$9.85, which sum defendant admits to hold in said account. If you find from the evidence that no part of said sums of money were deposited to the separate account of the plaintiff, but that all of said money was, with her consent, deposited to the joint account of the plaintiff and Fred Birdsall, or to their joint and several accounts, and that checks have properly been drawn and paid against said account, aggregating \$4,390.15, then your verdict should be for the plaintiff in the sum of \$9.85.

If you find from the evidence that any of said sums of money were deposited to a separate account of the plaintiff Mary Neville Birdsall, then your verdict should be for said plaintiff for the amount of money so deposited less the aggregate amount of checks which you may find from the evidence to have been drawn on said account by said Mary Neville Birdsall and paid by said defendant bank.

Section 33 of the Code of Civil Procedure of the State of California provides:

‘A minor cannot give a delegation of power, nor under the age of 18 make a contract relating to any personal property not in his immediate possession or control.’



Section 3103 provides:

‘The endorsement or assignment of the instrument by an infant passes the property therein notwithstanding that from want of capacity the infant may incur no liability thereon.’

The instrument there refers to a negotiable check. ‘Infant’ and ‘minor’ mean the same thing.

A JUROR: Will you read that again, your Honor?

THE COURT: ‘The endorsement or assignment of a negotiable check by an infant or minor passes the property therein notwithstanding that from want of capacity the infant or minor may incur no liability thereon.’ That is to say, by incurring a liability means that they are not liable on an endorsement.

I have stated to you that a minor cannot bind an agent, and any instruction given to the defendant bank by Birdsall would not bind the plaintiff except to the extent that the endorsement by her of a check made payable to her and delivered by her to Birdsall would create an apparent ownership in the said Birdsall of said check. To that extent she had a right and was bound by such apparent ownership when presented to the bank and the bank had a right to draw any reasonable inference from that fact, that the said Birdsall had a right to direct how the deposit should be made but had no right to give such directions to the bank except by virtue of that fact.

In receiving said deposit the defendant bank had a right to assume that any check presented to said bank for deposit was owned by the party presenting the

check, provided the check was duly endorsed without limitation of the endorsement by the payee thereof and the bank had no information which would put them upon notice to the contrary.

A deposit in the name of two persons with the word 'and' between the two names makes the account a joint account, and the money cannot be drawn from the bank except upon the signature of both persons. If a deposit is made in the bank in the name of two persons with the word 'or' between the names it makes the account joint and several. In such an instance either one of the parties may draw a check or both may draw a check together.

In determining whether or not any particular item was deposited to the credit of the plaintiff or to the joint or several credit of the plaintiff and Fred Birdsall you shall determine from the evidence what was the agreement of the party making the deposit in the bank.

In using the word 'the party may deposit' you shall not understand that I am referring to Fred Birdsall as an individual acting in this case, but you are to determine whether the transaction showed that such deposit was made by Mary Neville or by Fred Birdsall for her use and benefit.

In determining any question in the case you shall take into consideration all the evidence introduced and the circumstances surrounding any particular facts or act of the parties.

The evidence introduced here shows a pass book of the bank made out showing that the deposits were made to the account of Fred Birdsall or Mary Neville Birdsall. The Plaintiffs contends that she never saw that passbook with the name Fred Birdsall written in it. A question for you to determine is whether or not, upon the making of said first deposit, a different pass book was made out by the bank and that she saw such different pass book made out by the bank. If the only pass book that the bank made is the one introduced in evidence and that pass book was tendered at the time of making of any deposit you have a right to take that into consideration in determining the question as to whether or not said sums were deposited to the plaintiff's credit or to the joint or several account of Fred Birdsall and the plaintiff.

The plaintiff would not be bound by any transaction between Fred Birdsall and the bank that she did not know of at the time or had reasonable grounds to believe; for, as I have heretofore instructed you, she could not appoint an agent to transact business for her if you find she was a minor at the time.

A deposit slip made out by a party and presented to the bank at the time of the deposit is a direction to the bank to credit said deposit to the name of the party appearing on the deposit slip and the bank has no legal right to place said money to the credit of any other person or persons. The deposit slip, however, may be controlled by other evidence; that is to say,

the deposit slip is not conclusive as a direction to the bank as to whom the deposit shall be made. Oral directions may be given or other instructions may show that the party intended the deposit should be made in the name of some other party than that on the deposit slip.

If you find from the evidence that the plaintiff did not know that there was a joint and several account in the defendant bank then she would not be bound by a deposit of her money in the bank in such joint and several account. The presentation of a pass book to the bank at the time of making a deposit is evidence of what the depositor intended the bank to do and should be considered in connection with the deposit slip. Such book, however, would not bind the plaintiff in any way unless she knew of the existence of such pass book.

If Fred Birdsall presented a check to the bank which was payable to Mary Neville Birdsall and duly endorsed by her, and at the same time that said check was presented for deposit, a deposit slip to the effect that said money should be deposited to Mary Neville Birdsall, then the bank had no right to credit such deposit to the joint and several account of Fred Birdsall and Mary Neville Birdsall but should have credited it solely to Mary Neville Birdsall.

When you retire to consider of your verdict, elect one of your number foreman, and when you shall have agreed upon a verdict let the foreman sign it



and bring it into court. You cannot agree upon a verdict unless you all concur therein.

Are there any exceptions to the instructions?

MR. DUNNIGAN: Yes, your Honor.

THE COURT: Proceed, Mr. Dunnigan.

MR. DUNNIGAN: The defendant Continental National Bank excepts particularly to the last instruction given by the court to the effect that the presentation of a deposit slip and check in the name of Mary Birdsall, though endorsed by her deposit, raises a conclusive presumption. The ground of the objection is as follows: first that the statement of the court is not correct as a matter of law and, second, that it is contradictory of the other instructions.

Defendants also excepts to that part of the instructions following instruction No. 6 requested by the plaintiff to the effect that if a man deposits money in his wife's name he has no right to check it out, upon the specific ground that the instruction is confusing, especially in this case where it was deposited in the wife's name and also in the husband's name, the instruction being, we feel, ambiguous in that respect. The defendant also excepts to the refusal of the court to give the defendant's requested instruction No. 4.

The defendant objects to the instructions given by the court of its own motion to the effect that Mary Neville Birdsall would not be bound by a deposit in the bank in a joint or several account of her separate money without her instruction under the circumstances



of this case, first because the statement is contended by the defendant not to be the law, and, second, because it is contradictory, in this, that it contradicts the instruction which authorizes the bank to recognize properly endorsed checks in the hands of Birdsall as his property together with his right, so far as the bank is concerned, while acting in good faith, to accept and deal with the deposit according to his instructions and as his property.

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BE IT FURTHER REMEMBERED that thereupon, the cause having been submitted to the jury, and the jury having considered the same, duly returned into court a verdict in favor of the plaintiff and against the defendant, for the sum of Thirty-five Hundred (\$3,500.00) Dollars, together with interest at seven per cent (7%) per annum, from the 20th day of October, 1920, to the date of entry of judgment.

BE IT FURTHER REMEMBERED, that the foregoing is a full, true and correct statement of all of the evidence received, offered or received in the trial of said action, and of all of the exceptions taken and reserved, respecting the introduction or rejection of evidence or the proceedings in said case so far as the same relate to the specifications of error, or the specification of insufficiency of the evidence to sustain the verdict hereinafter referred to in this bill of exceptions.

## ASSIGNMENT OF ERRORS

The defendant, Continental National Bank does now hereby assign the following errors committed by the court in the trial of said cause, upon which it proposes to rely in the *prosecution* of a writ of error in the above entitled action, to wit:

### I.

The court erred in refusing to permit the defendant Continental National Bank to prove by oral testimony, that its books did not contain, and that there was no account upon its books other than the joint and several account referred to in the evidence, and especially that it had on its books, no account, or report of account, with the plaintiff Mary Neville Birdsall, or Mary Neville separately or individually, or with the defendant Fred Birdsall separately and individually, or any other account with either of the parties, other than the joint and several account referred to in the testimony.

### II.

That the court erred in instructing the jury that the fact that the deposit slip, being made out in the name of the plaintiff alone, and the fact that the deposit consisted of a check originally drawn to the order of the plaintiff, though properly endorsed by her and in the possession and offered for deposit by the defendant, Fred W. Birdsall, were conclusive on the defendant bank as to its obligation to deposit the amount of such check to the credit of the plaintiff

alone, and not to deposit the same to the joint and several account of the plaintiff and the defendant Birdsall, notwithstanding the fact that there was evidence to the effect that the defendant Birdsall presented said check as the apparent owner and holder thereof, and directed that it be deposited to the credit of said joint and several account, and notwithstanding the fact that the defendant, Continental National Bank in good faith, and relying upon the apparent ownership of said check in said defendant Birdsall, did actually deposit said money to the joint and several account of the plaintiff and the defendant, Fred W. Birdsall, and notwithstanding the fact that there was evidence to the effect that the defendant bank actually paid out said money in good faith upon the checks of the defendant, Fred W. Birdsall, in accordance with the terms of said deposit.

### III.

The defendant bank specifies that the court erred in instructing the jury to the effect that the defendant bank was not authorized to receive a deposit to the joint and several account of the defendant Birdsall and the plaintiff, even though said deposit was made by the defendant Birdsall of a check which was in fact the separate property of the plaintiff, even though properly endorsed by the plaintiff, and by her delivered to the defendant Birdsall for deposit, and even though the defendant bank in good faith believed said check the property of the defendant Birdsall, unless the plain-

tiff specifically consented to such deposit in such manner.

#### IV.

The defendant bank hereby specifies that the court erred in giving to the jury contradictory instructions in this: That the court instructed the jury that if plaintiff properly endorsed a check payable to her order and delivered it to the defendant Birdsall, that this act clothed the defendant Birdsall with an apparent ownership of such check, upon which the defendant bank was entitled to rely in accepting a deposit thereof from the defendant Birdsall, and that said instruction is contradictory to the instruction given by the court and mentioned in specification of error number II, above set forth, and that such instruction is contradictory to the instructions given by the court and mentioned in specification of error number III.

#### V.

The defendant bank hereby specifies that the court erred at the trial of said cause, in giving contradictory instructions to the jury, in this: That the court instructed the jury to the effect that if the check of the plaintiff was properly endorsed by her and delivered by her into the possession of the defendant Birdsall, that said defendant Birdsall thereby became the ostensible owner thereof, and that the defendant, if acting in good faith, might deal with him as such in respect to said check, and the court further instructed the jury to the effect that the name of the depositor written



on the deposit slip was not conclusive upon the bank as to the person to whom the deposit should be credited by the defendant bank, and that the intention of the person making the deposit might be ascertained or controlled by other circumstances, or by verbal instructions given at the time, and that such instructions were in conflict with instructions given by the court to the jury to the effect that if the deposit slip was in the name of the plaintiff, and the item was a check drawn to the order of the plaintiff and duly endorsed by her, and delivered to the defendant Birdsall for deposit, that then the defendant bank was required to enter such deposit to the credit of the plaintiff alone, irrespective of any instructions given to the defendant Birdsall by the plaintiff to deposit it to the joint and several account of the plaintiff and the defendant Birdsall, and irrespective of all and any other circumstances connected with or attendant on the making of such deposit, and irrespective of the fact that the bank, in acting upon such instruction, in good faith actually deposited said check to the joint and several credit of the plaintiff and the defendant Birdsall, and actually paid out said money in good faith upon the checks of the defendant Birdsall.

The defendant here specifies the following particulars wherein the verdict of the jury was contrary to the undisputed facts and conclusive evidence submitted to them in this case, towit:



## I.

The verdict of the jury, and the subsequent judgment entered thereon, is contrary to the undisputed and uncontradicted evidence in the case, insofar as it rendered a verdict in favor of the plaintiff and against the defendant for any part of the items of \$400.00 deposited in the account in question on the 29th day of September, and one of the items of \$500.00 deposited in the account in question, on the 4th day of October, for the reason that it was conclusively established by the evidence, without contradiction, that the plaintiff never had any title or interest in said sum or sums of money, or any part thereof, and for the further reason that the plaintiff in open court waived any right to recover any part of said sum or sums of money.

## II.

The evidence is insufficient to sustain that part of the verdict of the jury, and the judgment subsequently entered thereon, as to the sum of \$500.00 deposited in said account on the 21st of September, 1920, for the reason that it was conclusively established by the direct evidence introduced in the case that plaintiff duly endorsed said check, delivered the same to the defendant, F. W. Birdsall; that said check was by the said F. W. Birdsall, deposited with the defendant bank, and that the deposit slip upon which said deposit was made was to the joint and several account of the plaintiff and the said defendant Birdsall, and that the

same was entered upon the books of the bank to the joint and several credit of the plaintiff and the defendant Birdsall, and that the same was entered into a regular pass book of the bank to the joint and several credit of the plaintiff and defendant Birdsall, and the same was paid out upon joint and several checks of the plaintiff and defendant Birdsall, and that in all of said transactions, the defendant bank acted in good faith and did not individually or personally profit in any manner thereby, or receive or retain for its own account any part of such deposit.

### III.

The evidence is insufficient to sustain that part of the verdict of the jury, and the judgment subsequently entered thereon, as to the sum of \$2500.00 deposited in said account on the 2nd of October, 1920, for the reason that it was conclusively established by the direct evidence introduced in the case that plaintiff duly endorsed said check, and delivered the same to the defendant, F. W. Birdsall; that said check was by the said F. W. Birdsall, deposited with the defendant bank, and that the deposit slip upon which said deposit was made was to the joint and several account of the plaintiff, and the said defendant Birdsall, and that the same was entered upon the books of the bank to the joint and several credit of the plaintiff and the defendant Birdsall, and the same was paid out upon joint and several checks of the plaintiff and the defendant Birdsall, and that in all of said transactions,

the defendant bank acted in good faith, and did not individually or personally profit in any manner thereby, or receive or retain for its own account any part of such deposit.

#### IV.

The evidence is insufficient to sustain that part of the verdict of the jury, and the judgment subsequently entered thereon, as to the sum of \$500.00, deposited in said account on the 4th day of October, 1920, for the reason that it was conclusively established by the direct evidence introduced in the case that plaintiff duly endorsed said check, and delivered the same to the defendant, F. W. Birdsall; that said check was by the said F. W. Birdsall, deposited with the defendant bank, and that the deposit slip upon which said deposit was made was to the joint and several account of the plaintiff and the said defendant Birdsall, and that the same was entered upon the books of the bank to the joint and several credit of the plaintiff and the defendant Birdsall, and the same was paid out upon joint and several checks of the plaintiff and the defendant Birdsall, and that in all of said transactions, the defendant bank acted in good faith, and did not individually or personally profit in any manner thereby, or receive or retain for its own account any part of such deposit.

#### V.

The defendant bank further specifies that the said verdict of the jury and the judgment subsequently

entered thereon, are contrary to the undisputed facts established by the evidence in the case, as to the entire amount of said verdict in this: That it was established conclusively by the evidence in said case, without any evidence to contradict the same, that each and all of the items of the account sued for, were either the separate and distinct property of the defendant Fred W. Birdsall, or that the said Fred W. Birdsall was clothed with the apparent ownership thereof by the plaintiff; that each and all of said items were deposited to the joint or several account of the plaintiff and the defendant Fred W. Birdsall with the defendant bank, and that each and all of said items were paid out in good faith by the said defendant bank upon checks of the plaintiff and the said defendant Birdsall, and that the said bank, in receiving said deposits in the manner aforesaid, and in paying out said items of said money, except the sum of \$9.85, acted in good faith and in the belief that the said sums of money were the property of the defendant Fred W. Birdsall, and that as to the balance remaining in said account, of \$9.85, said bank had in good faith offered to pay the same to the plaintiff and the plaintiff had and continues to refuse to accept the same.

The defendant bank does now propose the above and foregoing as its proposed Bill of Exceptions to be used upon the prosecution of a Writ of Error in the above entitled action, for the correction of the



errors hereinbefore specified, and of the verdict in the above entitled action, and the judgment entered thereon, all as provided by law, and asks that the same be settled and allowed by the Court.

Dated: May 29th, 1922.

HAAS AND DUNNIGAN,  
Attorneys for the Defendant,  
Continental National Bank.

The foregoing Bill of Exceptions having been prepared and proposed and amended and engrossed, within the time allowed by law, and the extensions of time granted by the court and counsel, is hereby settled and allowed, and is correct.

Dated this 26 day of June, 1922.

Trippet

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Judge.

IT IS HEREBY STIPULATED that the facts stated in the above certificate are correct, and

IT IS STIPULATED that the Bill may be signed.

George B. Ross, and  
Newby & Palmer

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Attorneys for Plaintiff.  
Haas & Dunnigan

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*Attorneys for Defendant,*  
Continental National Bank.

[Endorsed]: ORIGINAL NO. 896 CIVIL IN  
THE DISTRICT COURT OF THE UNITED



STATES, for the Southern Division of the Southern District of California. MARY NEVILLE, Complainant vs. CONTINENTAL NATIONAL BANK, a corp. et al, Defendant PROPOSED BILL OF EXCEPTIONS FILED JUN 27 1922 Chas. N. Williams, Clerk Louis J. Somers Deputy HAAS & DUNNIGAN Suite 302 B. F. Coulter Building 213 S. Broadway Los Angeles, Cal. Solicitors for defendant bank.

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IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

MARY NEVILLE,	)	NO. 896 Civil
	)	
Plaintiff.	)	
	)	ASSIGNMENT
vs.	)	<hr/>
	)	OF ERRORS.
CONTINENTAL NATIONAL	)	<hr/>
BANK, a corporation, and FRED	)	
BIRDSALL,	)	
	)	
Defendants.	)	

Continental National Bank, defendant in this action, in connection with, and as a part of its petition for writ of error in the above entitled cause, makes the following assignment of errors, which it avers were committed by the Court in the proceedings and judgment against this plaintiff appearing on record herein, that is to say:

## I.

The court erred in refusing to permit the defendant Continental National Bank to prove by oral testimony, that its books did not contain, and that there was no account upon its books other than the joint and several account referred to in the evidence, and especially that it had on its books, no account, or report of account, with the plaintiff Mary Neville Birdsall, or Mary Neville separately or individually, or with the defendant, Fred Birdsall separately and individually, or any other account with either of the parties, other than the joint and several account referred to in the testimony.

## II.

That the court erred in instructing the jury that the fact that the deposit slip, being made out in the name of the plaintiff alone, and the fact that the deposit consisted of a check originally drawn to the order of the plaintiff, though properly endorsed by her and in the possession and offered for deposit by the defendant, Fred W. Birdsall, were conclusive on the defendant bank as to its obligation to deposit the amount of such check to the credit of the plaintiff alone, and not to deposit the same to the joint and several account of the plaintiff and the defendant Birdsall, notwithstanding the fact that there was evidence to the effect that the defendant Birdsall presented said check as the apparent owner and holder thereof, and directed that it be deposited to the credit of said joint and several account, and notwithstand-

ing the fact that the defendant, Continental National Bank in good faith, and relying upon the apparent ownership of said check in said defendant Birdsall, did actually deposit said money to the joint and several account of the plaintiff and the defendant Fred W. Birdsall, and notwithstanding the fact that there was evidence to the effect that the defendant bank actually paid out said money in good faith upon the checks of the defendant, Fred W. Birdsall, in accordance with the terms of said deposit.

### III.

The defendant bank specifies that the court erred in instructing the jury to the effect that the defendant bank was not authorized to receive a deposit to the joint and several account of the defendant Birdsall and the plaintiff, even though said deposit was made by the defendant Birdsall of a check which was in fact the separate property of the plaintiff, even though properly endorsed by the plaintiff, and by her delivered to the defendant Birdsall for deposit, and even though the defendant bank in good faith believed said check the property of the defendant Birdsall, unless the plaintiff specifically consented to such deposit in such manner.

### IV.

The defendant bank hereby specifies that the court erred in giving to the jury contradictory instructions in this: That the court instructed the jury that if plaintiff properly endorsed a check payable to her

order and delivered it to the defendant Birdsall, that this act clothed the defendant Birdsall with an apparent ownership of such check, upon which the defendant bank was entitled to rely in accepting the deposit thereof from the defendant Birdsall, and that said instruction is contradictory to the instruction given by the court and mentioned in specification of error number II, above set forth, and that such instruction is contradictory to the instructions given by the court and mentioned in specification of error number III.

#### V.

The defendant bank hereby specifies that the court erred at the trial of said cause, in giving contradictory instructions to the jury, in this: That the court instructed the jury to the effect that if the check of the plaintiff was properly endorsed by her and delivered by her into the possession of the defendant Birdsall, that said defendant Birdsall thereby became the ostensible owner thereof, and that the defendant, if acting in good faith, might deal with him as such in respect to said check, and the court further instructed the jury to the effect that the name of the depositor written on the deposit slip was not conclusive upon the bank as to the person to whom the deposit should be credited by the defendant bank, and that the intention of the person making the deposit might be ascertained or controlled by other circumstances, or by verbal instructions given at the time,



and that such instructions were in conflict with instructions given by the court to the jury to the effect that if the deposit slip was in the name of the plaintiff, and the item was a check drawn to the order of the plaintiff and duly endorsed by her, and delivered to the defendant Birdsall for deposit, that then the defendant bank was required to enter such deposit to the credit of the plaintiff alone, irrespective of any instructions given to the defendant Birdsall by the plaintiff to deposit it to the joint and several account of the plaintiff and the defendant Birdsall, and irrespective of all and any other circumstances connected with or attendant on the making of such deposit, and irrespective of the fact that the bank, in acting upon such instruction, in good faith actually deposited said check to the joint and several credit of the plaintiff and the defendant Birdsall, and actually paid out said money in good faith upon the checks of the defendant Birdsall.

WHEREFORE this defendant prays that said judgment be reversed.

Haas & Dunnigan  
HAAS AND DUNNIGAN,  
Attorneys for Defendant,  
Continental National Bank.

[Endorsed]: ORIGINAL No. 896 Civil IN THE DISTRICT COURT OF THE UNITED STATES, for the Southern Division of the Southern District of California. MARY NEVILLE Complainant



vs. CONTINENTAL NATIONAL BANK, a corporation, et al, Defendants ASSIGNMENT OF ERRORS FILED JUL 7 1922 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy HAAS & DUNNIGAN Suite 302 B. F. Coulter Building 213 S. Broadway Los Angeles, Cal. Solicitors for deft.

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IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

MARY NEVILLE,	)	No. 896 CIVIL
	)	
Plaintiff.	)	
	)	
vs.	)	PETITION FOR
	)	WRIT OF
CONTINENTAL NATIONAL	)	ERROR.
BANK, a corp., and FRED W.	)	
BIRDSALL,	)	
	)	
Defendants.	)	

To the Honorable the Judges of the United States District Court, in and for the South District of California, Southern Division:

Now comes the above named defendant, Continental National Bank, and files its petition for writ of error in the above entitled cause, and respectfully shows:

I.

That on the 16 day of February, 1922, this court entered a judgment on a verdict of the jury for

Thirty-three Hundred Eighty-six (\$3,386.40) Dollars, besides interest and costs, in favor of the plaintiff and against the defendant above named.

II.

That thereafter, this defendant duly made and presented to this court its motion for a new trial in the above entitled action, and that said motion was denied by this court on or about the 10th day of May, 1922.

III.

That in said judgment and in the trial of said action, and in the denial of said motion for a new trial, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the Assignment of Errors which this defendant has filed with this petition.

WHEREFORE, this defendant prays that a Writ of Error may be issued in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to said Circuit Court of Appeals for said Circuit, and that all further proceedings be suspended, stayed and superseded until the determination of said writ of error by said Circuit Court of Appeals for said Circuit.

HAAS AND DUNNIGAN,

Haas & Dunnigan

Attorneys for the Defendant,

Continental National Bank.

[Endorsed]: ORIGINAL NO. 896 Civil IN THE DISTRICT COURT OF THE UNITED STATES, for the Southern Division of the Southern District of California. MARY NEVILLE, Complainant vs. CONTINENTAL NATIONAL BANK, a corporation, et al. Defendant PETITION FOR WRIT OF ERROR FILED JUL 7 1922 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy HAAS & DUNNIGAN Suite 302 B. F. Coulter Building 213 S. Broadway LOS ANGELES, CAL. Solicitors for Deft.

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IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

MARY NEVILLE,	) No 896 Civil.
	)
Plaintiff.	)
	) ORDER
vs.	) ALLOWING
	) WRIT OF
CONTINENTAL NATIONAL	) ERROR.
BANK, a corp., et al,	)
	)
Defendants.	)

On this 7th day of July, 1922, came the defendant, Continental National Bank, by and through its attorneys, Haas and Dunnigan, and filed herein and presented its petition praying for the allowance of writ of error in the above entitled action to the

United States Court of Appeals for the Ninth Circuit, and it appearing to the court that said petition should be granted, and a transcript of the record and proceedings in the above entitled case, upon the judgment herein rendered, duly authenticated, together with the original assignment of errors, writ of error and citation, should be sent to the United States Circuit Court of Appeals for the Ninth Circuit as prayed, in order that such proceedings may be had as may be just to correct any manifest errors;

NOW THEREFORE, IT IS ORDERED that a writ of error be and the same is hereby allowed herein, and that the said writ of error issue out of and under the seal of the above entitled court to the clerk thereof; that a true copy of the record, proceedings and papers upon which the judgment herein was rendered, together with the assignment of errors, writ of error, and citation, duly authenticated according to law, shall be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, in order that said court may inspect the same and take such action thereon as it deems proper according to law and justice.

Dated this 7th day of July, 1922.

Trippet

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Judge.

[Endorsed]: ORIGINAL No. 896 Civil IN THE DISTRICT COURT OF THE UNITED STATES, for the Southern Division of the Southern District of California. MARY NEVILLE Complainant vs.

CONTINENTAL NATIONAL BANK a corporation,  
 et al., Defendants ORDER ALLOWING WRIT OF  
 ERROR FILED JUL 7 1922 CHAS. N. WIL-  
 LIAMS, Clerk By R S Zimmerman Deputy HAAS  
 & DUNNIGAN Suite 302 B. F. Coulter Building  
 213 S. Broadway LOS ANGELES, CAL. Solicitors  
 for deft.

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IN THE DISTRICT COURT OF THE UNITED  
 STATES, FOR THE SOUTHERN DISTRICT  
 OF CALIFORNIA, SOUTHERN  
 DIVISION.

MARY NEVILLE,	)	No. 896 Civil.
	)	
Plaintiff,	)	
	)	
vs.	)	BOND ON
	)	APPEAL.
CONTINENTAL NATIONAL	)	
BANK, a corporation, et al,	)	
	)	
Defendants.	)	

KNOW ALL MEN BY THESE PRESENTS, that  
 we, CONTINENTAL NATIONAL BANK, a cor-  
 poration, of Los Angeles, California, as principal, and  
 United States Fidelity and Guaranty Company of

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Maryland, a corporation,

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as surety, are held and firmly bound unto Mary Ne-  
 ville, in the sum of \$6,000.00 lawful money of the  
 United States, to be paid to her, her heirs, executors,



administrators, successors and assigns, to which payment well and truly to be made, we bind ourselves and each of us jointly and severally, and each of our executors and assigns by these presents.

Sealed with our seals this 8th day of July, 1922.

WHEREAS, the above named Continental National Bank has prosecuted a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment of the District Court of the United States, Southern District of California, Southern Division, in the above entitled cause,

NOW THEREFORE, the condition of this obligation is such that if the above named Continental National Bank shall prosecute this appeal to effect and answer all costs if it fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

CONTINENTAL NATIONAL BANK,

(Seal)

By W. D. Howard

---

President

By

---

Principal

UNITED STATES FIDELITY AND GUARANTY

---

COMPANY OF MARYLAND,

By J. St. Paul White

---

its attorney in fact

(seal)

---

Surety

Examined and recommended for approval as provided in rule 29.

Wm. Fleet Palmer  
Attorney

I hereby approve the foregoing bond.

Dated the 8th day of July 1922

Trippet  
Judge

STATE OF CALIFORNIA            )  
  )ss:  
COUNTY OF Los Angeles        )

On this 8th day of July in the year one thousand nine hundred and twenty-two, before me, Frances L Bennett, a Notary Public in and for said County and State, residing therein duly commissioned and sworn, personally appeared J St Paul White, known to me to be the duly authorized Attorney-in-fact of the UNITED STATES FIDELITY AND GUARANTY COMPANY, and the same person whose name is subscribed to the within instrument as the Attorney-in-fact of said Company, and the said J St Paul White duly acknowledged to me that he subscribed the name of the UNITED STATES FIDELITY AND GUARANTY COMPANY thereto as Surety and his own name as Attorney-in-fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

(Seal)

Frances L Bennett  
Notary Public in and for County, State of  
California

[Endorsed]: ORIGINAL No. 896 Civ. IN THE DISTRICT COURT OF THE UNITED STATES, for the Southern Division of the Southern District of California. MARY NEVILLE, Complainant vs. Continental National Bank a corporation, *et* Defendant BOND ON APPEAL FILED JUL 7 1922 CHAS. N. WILLIAMS, Clerk By Edmund L Smith Deputy HAAS & DUNNIGAN Suite 302 B. F. Coulter Building 213 S. Broadway Los Angeles, Cal. Solicitors for Deft. C. N. B.

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IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

MARY NEVILLE,	)	No. 896 Civil.
	)	
Plaintiff,	)	
	)	PRAECIPE FOR
vs.	)	RECORD ON
CONTINENTAL NATIONAL	)	WRIT OF
BANK, a corp., and FRED W.	)	ERROR.
BIRDSALL,	)	
	)	
Defendants.	)	

TO THE CLERK OF SAID COURT,

Sir: Please prepare record on writ of error and include therein the following papers:

Amended complaint; demurrer to amended complaint; order overruling demurrer to amended complaint; verdict of the jury; judgment; bill of excep-

tions; assignment of errors; petition for writ of error; citation for writ of error; order allowing writ of error; and praecipe for record on writ of error.

Dated this 7 day of July, 1922.

Haas & Dunnigan  
HAAS & DUNNIGAN,  
Attorneys for the Defendant,  
Continental National Bank.

[Endorsed]: ORIGINAL No. 896 Civil IN THE DISTRICT COURT OF THE UNITED STATES, for the Southern Division of the Southern District of California. MARY NEVILLE Complainant vs. CONTINENTAL NATIONAL BANK, a corporation, et al, Defendants PRAECIPE FOR RECORD ON WRIT OF ERROR FILED JUL 7 1922 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy HAAS & DUNNIGAN Suite 302 B. F. Coulter Building 213 S. Broadway Los Angeles, Cal. Solicitors for deft.

IN THE DISTRICT COURT OF THE UNITED  
STATES, FOR THE SOUTHERN DISTRICT  
OF CALIFORNIA, SOUTHERN  
DIVISION.

MARY NEVILLE,	) NO. 896 Civil.
	)
Plaintiff.	)
	) SUPPLEMENTAL
vs.	) PRAECIPE FOR
	) RECORD ON WRIT
CONTINENTAL NA-	) OF ERROR.
TIONAL BANK, a cor-	)
poration, and FRED W.	)
BIRDSALL,	)
	)
Defendants.	)

TO THE CLERK OF SAID COURT:

Sir: Please include in the record on Writ of Error in the above entitled action, the following papers in addition to those requested by Praecipe herein, dated July 7th, 1922, towit:

Amended Answer to *Amend* Complaint

Writ of Error and the Bond on Appeal.

Omit Demurrer to Amended Complaint and order overruling same there being no such papers on file

Dated this 18th day of July, 1922.

Haas and Dunnigan,  
HAAS AND DUNNIGAN,

Attorneys for the Defendant,  
Continental National Bank.

[Endorsed]: ORIGINAL No. 896 Civil IN  
THE DISTRICT COURT OF THE UNITED



STATES, for the Southern Division of the Southern District of California. MARY NEVILLE, complainant vs. CONTINENTAL NATIONAL BANK, a corporation, et al, Defendants SUPPLEMENTAL PRAECIPE FOR RECORD ON WRIT OF ERROR. FILED JUL 20 1922 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy HAAS & DUNNIGAN Suite 302 B. F. Coulter Building 213 S. Broadway Los Angeles, Cal. Solicitors for said deft.

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IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

MARY NEVILLE	)	
	)	
	)	
Plaintiff	)	
vs.	)	CLERK'S
	)	
CONTINENTAL NATIONAL	)	CERTIFICATE.
BANK and ALFRED W. BIRD-	)	
SALL	)	
	)	
Defendants	)	

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 111 pages, numbered from 1 to 111 inclusive, to be the Transcript of Record on Writ of Error in the above entitled cause, as printed by plaintiff in error and presented to me for comparison and certifica-

tion, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation, writ of error, amended complaint, amended answer of Continental National Bank, verdict, judgment, bill of exceptions, assignment of errors, petition for writ of error, order allowing writ of error, bond on appeal, praecipe and supplemental praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Writ of Error amount to and that said amount has been paid me by the plaintiff in error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this                      day of August, in the year of our Lord One Thousand Nine Hundred and Twenty-one, and of our Independence the One Hundred and Forty-seventh.

CHAS. N. WILLIAMS,  
Clerk of the District Court of the  
United States of America, in and  
for the Southern District of California.

By

Deputy.



3914

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IN THE  
United States  
Circuit Court of Appeals, 9  
FOR THE NINTH CIRCUIT.

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Continental National Bank, a corpora-  
tion,

*Plaintiff in Error,*

*vs.*

Mary Neville,

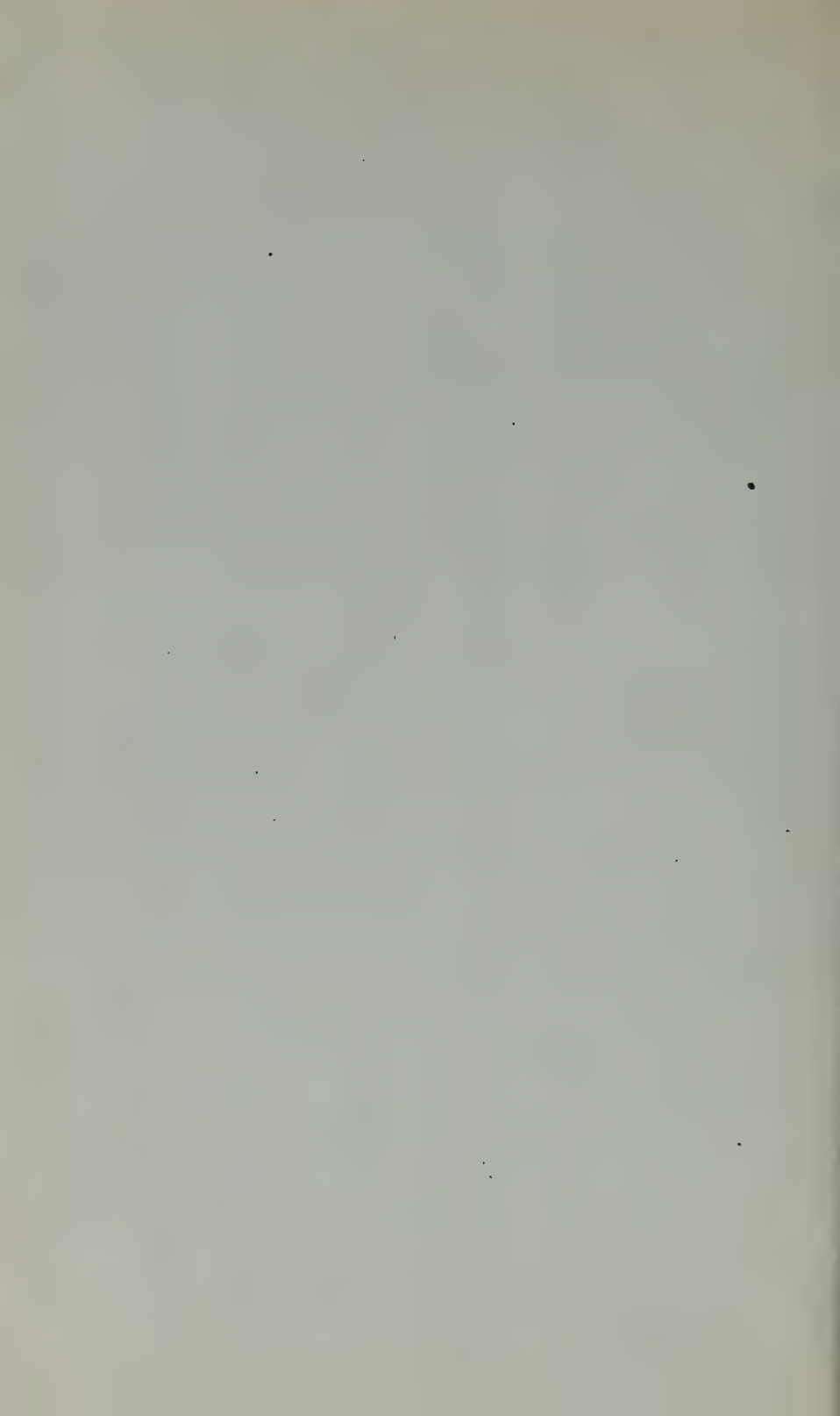
*Defendant in Error.*

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Opening Brief on Behalf of Plaintiff in Error.

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HAAS & DUNNIGAN,  
By H. L. DUNNIGAN,  
*Attorneys for Plaintiff in Error, Continental National  
Bank.*





IN THE  
United States  
Circuit Court of Appeals,  
FOR THE NINTH CIRCUIT.

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Continental National Bank, a corpora-  
tion,

*Plaintiff in Error,*

*vs.*

Mary Neville,

*Defendant in Error.*

---

**Opening Brief on Behalf of Plaintiff in Error.**

This is a writ of error to the District Court, for the Southern District of California, Southern Division, for the correction of errors occurring in the trial of the action, and in the rendition of the verdict of the jury, and the entry of judgment thereon.

The action was commenced by the defendant in error against the plaintiff in error, and one Fred Birdsall, for the recovery from the plaintiff in error of the amount claimed as a balance upon a certain bank account of the defendant in error with the plaintiff in error.

The plaintiff in error claimed that the account was a joint and several checking account, standing in the name of the defendant in error, and the said Fred W. Birdsall, and that all of the funds deposited in said account had been checked out, either by the checks of the said Fred W. Birdsall, or the defendant in error, excepting the sum of \$9.85, which balance the plaintiff in error admitted and offered to pay.

The defendant in error, Mary Neville, claimed that as to four items of deposit, amounting to \$3,500.00, the same were her separate property, and deposited in her individual name alone; that against these funds she had drawn checks aggregating \$137.60, and no more, and that as to the balance amounting to \$3,386.40, the same was not subject to be charged to the checks of the defendant Birdsall.

The jury returned a verdict in favor of the defendant in error, Mary Neville. The proceedings at the trial are up on a bill of exceptions.

### STATEMENT OF FACTS.

The first deposit was made in the account September 21st, 1920, and the last entry in the account, October 6th, 1920, or a total lapsed period of sixteen days. During this period of time and for a few days thereafter, the defendant in error, Mary Neville and the defendant, Fred W. Birdsall, were living together as husband and wife, and as the defendant in error claims, in the belief so far as she was concerned, that she was

his wife. She went by the name of Mary Neville Birdsall.

Mary Neville became eighteen years of age on the 30th day of October, 1920, or a month and ten days after the first deposit was made, and less than a month after the last check was presented against the account.

The account in full is set forth in pages 60 to 62 of the transcript. The dates and amounts of the deposits in this account are as follows:

September 21st, 1920.....	\$ 500.00
September 29th, 1920.....	400.00
October 2nd, 1920.....	2500.00
October 4th, 1920.....	500.00
October 4th, 1920.....	500.00

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Total .....	\$4400.00
-------------	-----------

All of the checks drawn against this account were signed either by Fred W. Birdsall or by Mary Neville alone. They are set out in the transcript at pages 35 to 43 and those signed by Mary Neville aggregated \$113.60, and those signed by Fred W. Birdsall aggregated \$4,276.45.

The history of the deposits of this account is as follows:

The first item of September 21st, 1920, \$500.00, was a check of Mrs. Kate Neville in favor of Mary Neville Birdsall (the defendant in error) endorsed by Mary Neville. [See Tr. pp. 26 and 27.] The defendant in error testified that she endorsed this check and gave it to her supposed husband, Fred W. Birdsall, to de-

posit in the Continental National Bank for her. [See Tr. p. 26.]

The defendant Fred W. Birdsall took the check and presented it to the president of the Continental National Bank, the plaintiff in error, and requested that it be deposited to the joint and several credit of Fred W. Birdsall and Mary Neville Birdsall. [Testimony of Nichols, Tr. p. 63.]

The president, Mr. Nichols, thereupon prepared a deposit slip showing the deposit of \$500.00 to the joint credit of Mary Neville Birdsall and Fred Birdsall. [Testimony of Nichols, Tr. p. 64.] The deposit slip, a part of Exhibit 12, is set out at page 50 of the transcript.

The president also prepared a signature card and took the signature of Fred Birdsall. A copy of this card is set out at page 29 of the transcript, being Exhibit 9b.

The president also prepared a customer's pass or deposit book, writing thereon as the name of the depositor, "Fred Birdsall or Mary Neville Birdsall." A copy of this book, Exhibit 7, is found at page 45, etc., of the transcript.

The president then delivered the deposit slip and the check to the bookkeeper, with directions to open an account according to the deposit slip, and the account was accordingly opened upon the books of the bank in the names of "Fred Birdsall or Mary Neville Birdsall." A copy of the account is set out in the transcript at page 60, Exhibit B. As originally entered upon the

books of the bank, it read "Fred Birdsall and Mary Neville Birdsall," but the word "and" was erased and the word "or" substituted to conform to the instructions. [See testimony of Mr. Nichols, Tr. p. 69. See also testimony of Mary Neville, Tr. pp. 73 and 74.]

A few days later Fred Birdsall brought the defendant in error, Mary Neville, to the bank and introduced her to the president, Mr. Nichols, and Mr. Nichols then prepared, and she signed, a signature card. There was no conversation about the account. [See testimony of Mary Neville, Tr. p. 28.] A copy of the signature card, Exhibit 9, is set out on page 28. [See also testimony of Mr. Nichols, Tr. p. 72.]

On September 29th, the note department, or note teller, of the bank, made out a deposit slip in favor of Fred Birdsall for \$400.00; the item was credited to the account in question. [See testimony of Wolfe and copy of deposit slip, Tr. p. 58.] The plaintiff disclaimed any interest in this money. [See statement of counsel in open court, Tr. p. 74.]

The item of deposit of October 2nd, \$2,500.00, was a check drawn in favor of Mary Neville, the defendant in error, as the price of an automobile. Mary Neville endorsed the check and gave it to her husband and went to the bank with him to make the deposit. [See testimony of Mary Neville, Tr. p. 29.] But the deposit slip was made out in the name of Mary Neville alone. A copy of the deposit slip is set out in the transcript at page 50. It was made out by the defendant Birdsall.



The president, Mr. Nichols, testified that he personally took this deposit and entered the same in the joint and several pass book. Mr. Birdsall presented the book with the check and the deposit slip for deposit. [See testimony of Mr. Nichols, Tr. p. 64.]

On October 4th, two deposits were made of \$500.00 each. As to one of these deposits the deposit slip was made out in the name of Fred Birdsall. A copy of the deposit slip is set out at page 50 of the transcript. The plaintiff in error disclaimed at the trial, any interest in this money. [See statement of counsel in open court, Tr. p. 74.]

The other item deposited was a cashier's check in favor of Mary Neville Birdsall, duly endorsed by her. [See copy of check, Tr. p. 30.]

The defendant in error testified, at page 52:

“Q. By Mr. Dunnigan: Did you at any time speak to any teller or any officer in the bank or give them any direction as to any of these deposits you have testified about?

A. No, sir. I never made out a deposit slip. I do not think there was anything said by Mr. Birdsall in my presence at the bank, and in the presence of any teller, employe or officer of the bank respecting these deposits.”

### POINTS FOR REVERSAL.

Plaintiff in error will ask the court to reverse the judgment, for the following reasons, which will be hereafter discussed in their consecutive order.

I. That the evidence is insufficient to sustain a verdict for any amount in favor of the plaintiff in the court below, Mary Neville.

II. That the court erred in giving to the jury contradictory instructions in this: That the court in one part of the instructions instructed the jury that the possession of a negotiable check, duly endorsed by the defendant Fred Birdsall, entitled him to be treated by the bank as the owner thereof, and further instructed the jury that a deposit slip did not express the binding contract of the parties as to the nature or conditions of the deposit; and in another part of the instructions, the court instructed the jury that if the defendant Fred Birdsall presented to the bank a check drawn in favor of Mary Neville, together with a deposit slip containing the name of Mary Neville alone, and the money represented by the check was the separate property of Mary Neville, then the bank would necessarily be required to deposit the money to the credit of Mary Neville alone, irrespective of any other circumstance in the transaction.

III. The court erred in instructing the jury as follows:

“If Fred Birdsall presented a check to the bank which was payable to Mary Neville Birdsall and duly endorsed by her, and at the same time that said check was presented for deposit, a deposit slip to the effect that said money should be deposited to Mary Neville Birdsall, then the bank had no right to credit such

deposit to the joint and several account of Fred Birdsall and Mary Neville Birdsall but should have credited it solely to Mary Neville Birdsall.”

I.

**That the Evidence is Insufficient to Sustain a Verdict for Any Amount in Favor of the Plaintiff in the Court Below, Mary Neville.**

As pointed out in the preceding statement of facts, the defendant in error, Mary Neville, never delivered to the bank any checks or money; never had any personal transaction with the bank respecting the account in question, except to sign and deliver a signature card.

The bank was not chargeable with notice that the money represented by the checks which were deposited, was the property of Mary Neville. The checks were negotiable in form and properly endorsed. (The authorities in support of this contention will be cited in the discussion of the third and last point of this brief, and are omitted here for the sake of brevity.)

The original deposit slip was joint and several. Yet the jury by their verdict included the amount represented by this deposit in the amount fixed in the verdict. As to the other deposit slips, they contained the name of Mary Neville alone.

The deposit slip was not the contract of the parties, and was merely *prima facie* evidence of the transaction. (The authorities in support of this will also be discussed under the third and last point of this brief, and are here omitted for the sake of brevity.)

In each instance, however, the joint and several deposit book which contained the names of both Mary Neville Birdsall and Fred Birdsall, was presented with the deposit, and entered upon the pass book.

This constituted in itself a representation or request by Fred Birdsall in making the deposit, that the money should be credited to that fund. The deposit slip in point of fact did not contradict the act of the bank in crediting the money to the joint and several account, because Mary Neville had the same right to check upon this account as did Fred Birdsall, and it was in truth and in fact, a credit in her name.

The two deposits, one of \$400.00, and the other of \$500.00, the title to which the defendant in error disclaimed at the trial, were presented with deposit slips in the name of Fred Birdsall alone, and credited to the same joint and several account.

The first was presented with a passbook and entered in the passbook, and the second was made out by the bank itself without the passbook, and credited to the same account, presumably alone, as the deposit slip itself shows that it was a bank item.

The fact that the signature cards were separate is explained by the circumstance that they were signed at different times. It is a matter of common knowledge that signature cards of customers are kept by the tellers who handle the funds, and not by the executive officers of the bank who do not handle such transactions.



Mr. Nichols, the president, testified that this was the only account on the books of the bank in which Mary Neville was interested.

“Q. I believe I asked you whether during the time this joint account was open, either of the parties had any other account with the bank?

A. Not to my knowledge.” [Tr. p. 67.]

There could therefore be no confusion as to the crediting of these deposits as between two or more distinct accounts. It was a rule of the bank that nobody but its officers were authorized to open new accounts. Mr. Nichols testified at page 66 of the transcript:

“Q. Who in the bank has authority to accept new deposits, or had at that time?

A. The officers, I think, were all. The tellers were not permitted to open new accounts. I never heard of any other account with these people. I gave directions for the opening of that account.”

It is a custom among banks in the locality where this transaction occurred, that deposit slips for deposits in joint and several accounts, may contain the name of either one or both of the joint depositors. Mr. Nichols upon this subject testified at page 66, *et cet.* of the transcript:

“I have been in the banking business over 16 years and in this city 13 years. I was cashier for the California Savings for 10 years and of the Continental for 3 years—or president of the Continental two years and a half.



Q. Are you able to state whether it was customary in all cases of joint accounts to have both signatures on the same card?

A. It is not.

Q. I will ask you whether or not it is customary on deposit slips to always put your names on a joint card or a joint slip?

A. It is not.

Q. What is the custom as to depositing—not in one bank alone, but is there a custom as to making deposits in joint accounts where the slip only contains one name of a depositor instead of both?

A. It will be credited in the joint account.

Q. Would the fact that there was or was not any other open account on the books of the bank have anything to do with that?

A. Well, if I understand you, if there was a joint account and another account, the other would likely be under the name of one as 'special,' or 'No. 2,' or some word to designate that it was an individual account otherwise there would be confusion in the books."

As a matter of fact the court instructed the jury that general custom would be binding upon the parties herein.

"The usage of banks in respect to the powers and duties of its officers so far as such usage is known to the business public enters into and qualifies the contracts made by such banks through their officers. Custom and usage, if reasonable, have a binding force between the bank and the customer." [Tr. p. 77.]

It therefore appears that there was nothing unusual on the part of the bank in crediting the deposits as it did credit them in this case.

There is not in the evidence, a scintilla to indicate that the bank had any notice of the intention of the defendant in error to have these moneys deposited to her separate account or credit.

Even though defendant in error was a minor, she was still competent to pass title to a negotiable instrument, and the court so instructed the jury. We quote the instruction which is also a quotation of section 3103 of the Civil Code of California.

“Section 3103 provides:

‘The endorsement or assignment of the instrument by an infant passes the property therein notwithstanding that from want of capacity the infant may incur no liability thereon.’”

The only possible suggestion of any evidence which would indicate a substantial conflict in the evidence are the following circumstances, which were suggested by defendant in error at the trial, and therefore mentioned here. These are as follows:

The plaintiff testified at page 26 of the transcript that she had instructed her supposed husband to deposit the first check in her name, and she testified that he afterwards showed her a passbook which did not contain his name, but did contain her name, showing the deposit of \$500.00. [Tr. p. 27.]

She was shown the passbook which was issued, but could not say whether or not it was the one which she had originally seen. [Tr. p. 27.]

On the other hand, Mr. Nichols, the president, testified [Tr. p. 65] that this was the only passbook ever issued, and that both names were written upon the passbook at the time it was issued. [Tr. p. 65.]

The bank would not be bound by the presentation to Mary Neville by her husband of any fictitious passbook. Such testimony was mere hearsay so far as the plaintiff in error is concerned.

Another circumstance which might be suggestive, is that the bank had a stamp, sometimes used on signature cards, which read as follows:

“Joint owners subject to order of either, balance at the death of either belonging to the survivor.”

Mr. Nichols testified that this was sometimes used upon the request of a customer, and sometimes not. That there was no rule upon the subject. [See Tr. p. 68.]

The final circumstance was that on the original account, the entry was first made “Mary Neville Birdsall and Fred Birdsall” and was changed to “Mary Neville Birdsall or Fred Birdsall.” The president, Mr. Nichols, testified the difference between these two entries would mean that, according to the former method, both signatures would be required to a check, and if by the latter method, but one signature. He further testified that the direction which he gave was shown upon the orig-

inal deposit slip; that the word “or” was the one he directed to be used, and was in accordance with the request of Mr. Birdsall in opening the account. [See Tr. pp. 68 and 69.]

At the trial these circumstances were urged as evidence of the fact that the account was originally opened in the name of Mary Neville Birdsall alone, and that someone had changed the books of the bank. These circumstances were not sufficient in themselves to make a *prima facie* inference that any such thing had occurred, and they were completely overcome by the direct testimony in the case.

For these reasons, we earnestly submit, irrespective of all other considerations, the verdict should have been by the trial judge directed in favor of the plaintiff in error here, Continental National Bank.

## II.

### The Instructions Given by the Trial Court to the Jury Were Contradictory.

The court instructed the jury, among other things:

“In receiving said deposit the defendant bank had a right to assume that any check presented to said bank for deposit was owned by the party presenting the check, provided the check was duly endorsed without limitation of the endorsement by the payee thereof and the bank had no information which would put them upon notice to the contrary.” [Tr. pp. 80 and 81.]

In this instruction the court unmistakably told the jury that when the defendant Birdsall presented the



first two deposits in question, \$500.00 September 21st, and \$2500.00 October 2nd, that the bank had the right to treat the defendant Birdsall as the owner thereof, and it follows as a necessary consequence that if the bank had the right to treat Fred Birdsall as the owner of these two items, it had a right to deposit them in any manner that Birdsall should direct.

It matters not that there was evidence in the record from which the jury might have believed that the bank otherwise had notice of the different ownership of the money represented by these checks. They were still told that if they believed that the bank had no such notice, then the possession of a check by the defendant Fred Birdsall, even though payable to the defendant in error, Mary Neville Birdsall, yet if duly endorsed by her, was evidence that the same was owned by Fred Birdsall, in whose possession it was found. This is especially true in view of the fact that the court had instructed the jury that the defendant in error, though a minor, was competent to pass title to negotiable paper by delivery and endorsement.

Again the court instructed the jury:

“The deposit slip, however, may be controlled by other evidence; that is to say, the deposit slip is not conclusive as a direction to the bank as to whom the deposit shall be made. Oral directions may be given or other instructions may show that the party intended the deposit should be made in the name of some other party than that on the deposit slip.” [Tr. pp. 82 and 83.]



In this instance there was evidence before the jury that both the check and the deposit slip and the passbook were in the joint names as to the item of \$500.00 opening the account on September 21st. There was evidence before the jury that as to the second item of \$2500.00, the deposit slip was in the name of Mary Neville Birdsall, but that there was presented with the deposit slip the passbook which was in the joint names; both were presented by Fred Birdsall, and the bank entered the item to the joint and several account.

Therefore, by these two instructions the jury were entitled to find for the bank as to these two particular items, if they believed that the checks, though payable to the defendant, Mary Neville, were endorsed by her, and delivered to the possession of her husband, and by him presented as the owner thereof to the bank, with instructions to enter in the joint and several account.

There was ample evidence to sustain all this, as in the one case both the check and the deposit slip were in the joint names, and in the second case, the check was unconditionally endorsed and delivered into the possession of Fred Birdsall, and he presented it with the joint and several passbook for deposit.

Notwithstanding these two instructions, the court further on in its instructions to the jury [Tr. p. 83] gave the following instruction:

"If Fred Birdsall presented a check to the bank which was payable to Mary Neville Birdsall and *duly endorsed by her*, and at the same time that said check was presented for deposit, a deposit slip to the effect

that said money should be deposited to Mary Neville Birdsall, then the bank had no right to credit such deposit to the joint and several account of Fred Birdsall and Mary Neville Birdsall but should have credited it solely to Mary Neville Birdsall."

This instruction flatly and unconditionally contradicts the law as given to the jury in the two preceding portions of the instructions, as above quoted.

We take the liberty of deferring to a later portion of this brief a discussion of the question as to which of the above instructions was correct, but desire to confine our argument at this point to the fact that they were *contradictory*, and that this contradiction constituted reversible error.

In the portion of the instructions last above quoted, it is to be noted that there were only two propositions involved.

One, that the check presented, though properly endorsed, was only payable to Mary Neville Birdsall, and the other, that the deposit slip was made in the name of Mary Neville Birdsall alone. In the portion of the instructions first above quoted, the court had told the jury that the possession of the check, properly endorsed, was *prima facie* evidence of title in the possessor, and this applied as well to a check originally payable to the defendant in error as to any third person.

In the portion of the instructions to the jury second above quoted, the court had told the jury that the fact that the deposit slip was in the name of one party

alone, raised only a rebuttable presumption. The correct analysis of that portion of the instructions last above quoted, therefore, resolves itself into the proposition that a presumption in favor of the bank, taken in conjunction with a rebuttable presumption against the bank, raises a conclusive presumption against the bank.

It should be remembered as above noted, that there was evidence to overcome the rebuttable presumption stated by the court, arising from the nature of the deposit slip, and there was also evidence before the court (which we feel conclusive) that the bank was without any notice whatever to overcome the presumption in its favor growing out of the ostensible ownership by Fred Birdsall.

*The giving of contradictory instructions is reversible error.*

In the case of *Hesler v. California Hospital Co.*, 178 Cal. 764, the court at page 768 said:

“The court below in other instructions stated the rule by which the defendants were bound, accurately and clearly. There is a clear conflict in the instructions. We are unable to determine which set of rules the jury followed.”

In the case of *Pierce v. United Gas and Electric Co.*, 161 Cal. 176, the court said at page 184 *et cct.*:

“It is clear that an instruction directing a verdict for the plaintiff in the event that the jury finds certain facts to be true, must embrace all the things necessary to show the legal liability of the defendant and to warrant the direction or conclu-

sion contained therein that plaintiff is entitled to a verdict, and such is the rule in this state. (See *Killelea v. California etc. Co.*, 140 Cal. 602 (74 Pac. 157).) \* \* \* It is true that other instructions were given at the request of defendant that stated the law in these respects as favorably to defendant as was warranted, if not more favorably. But the giving of these other instructions simply produced a clear conflict in the instructions given the jury by the court, and it is impossible for us to say which instruction the jury followed in arriving at a verdict in favor of plaintiff."

In the case of *Starr v. Los Angeles Ry. Corporation*, 201 Pac. 599, the court at page 603 said:

"It is true, as respondent points out, that the instructions are to be construed together, but where the instructions are flatly contradictory, as is the case where the jury is instructed upon a specific state of facts to bring in a verdict in favor of the plaintiff or defendant and is elsewhere instructed in general terms not to do so, the instructions must be held to be conflicting and prejudicial, because it cannot be ascertained upon what theory the verdict was returned. The theory of the plaintiff and defendant were diametrically opposed, and the evidence, as well as the instructions, was sharply conflicting. Under this condition it cannot be said that there is no miscarriage of justice when it cannot be ascertained from the record upon what theory the jury was authorized by the instructions of the court to render its verdict, or upon what state of facts shown in evidence the verdict was reached."



In the case of *Noce v. United Railroads*, 200 Pac. 819, the court at page 822, said:

“Where two instructions are contradictory in essential parts, the judgment must be reversed. *Hayden v. Constantinople Mining & Dredging Co.*, 3 Cal. App. 136, 84 Pac. 422. See also, *People v. Ross*, 19 Cal. App. 469, 126 Pac. 375.”

In the case of *Sappenfield v. Main St. Etc. R. R. Co.*, 91 Cal. 48, the court at page 59 says:

“The error in giving the foregoing instruction was not obviated by the instruction subsequently given at the instance of the defendant, wherein the law applicable to the case was properly presented. The jury could not determine which of the two propositions was correct. They were bound to accept all the propositions that the court instructed them upon as a correct statement of the law by which they were to be guided, and if the several instructions are inconsistent or contradictory, it is impossible to tell which was adopted by them in reaching their verdict.”

### III.

**The Court Erred in Instructing the Jury That the Presentation by Fred Birdsall of a Deposit Slip in the Name of Mary Neville Birdsall Alone, Together With the Fact That the Item was a Check Originally Drawn to Mary Neville Birdsall, Though Properly Endorsed, so Conclusive Upon the Bank.**

The instruction complained of has been previously quoted, and is in the words following:



“If Fred Birdsall presented a check to the bank which was payable to Mary Neville Birdsall and duly endorsed by her, and at the same time that said check was presented for deposit, a deposit slip to the effect that said money should be deposited to Mary Neville Birdsall, then the bank had no right to credit such deposit to the joint and several account of Fred Birdsall and Mary Neville Birdsall, but should have credited it solely to Mary Neville Birdsall.”

This instruction was tantamount to an instruction to return a verdict for the plaintiff, as to all of the items in question except the deposit of September 21st, for \$500.00, because in each case the item was a check drawn in favor of defendant in error, properly endorsed by her and presented for deposit by Fred W. Birdsall, together with a deposit slip containing the name of Mary Neville Birdsall.

It should be noted that the circumstances in the case at bar were not such that the bank in crediting the deposit contradicted in any way the terms of the deposit slip. This is not such a case as where a deposit slip in favor of A is by the bank for some reason credited to the account of B. The deposit, being made to the credit of A and B, is still a deposit to the credit of A. This deposit being put in the joint and several account, was a deposit to the credit of Mary Neville Birdsall, in accordance with the deposit slip, and the only objection that could be made to the transaction, was that the deposit slip did not contain the *entire contract*.

The instruction was erroneous for the following reasons:

(a) The fact that the item of deposit, a check, was originally payable to the order of Mary Neville Birdsall, did not raise any presumption of fact in favor of Mary Neville Birdsall. On the contrary, the fact that the check was unconditionally endorsed by her, and in the possession of the defendant Fred Birdsall, raised a presumption in favor of the bank that the item was Fred Birdsall's property;

(b) The instruction was tantamount to stating that the deposit slip was conclusive upon the bank, while on the contrary, the deposit slip was only *prima facie* evidence; and

(c) The instruction, in excluding from the consideration of the jury the facts

1st. That Fred Birdsall gave personal direction that the items in question be deposited to the joint and several account, and

2nd. That in connection with the deposit slip, the defendant Birdsall presented the joint and several pass-book, for the purpose of having the deposit entered thereon;

both of which would overcome any presumption arising from the statements in the deposit slip.

We will separately present the authorities in support of these several propositions, as follows:

The first proposition we desire to discuss is that the possession by Fred Birdsall of the check of Mary

Neville Birdsall, unconditionally endorsed by her, was presumptively the property of Fred Birdsall.

The case of United States, Etc., v. the First National Bank, 18 Cal. App. 437, is very similar to the case at bar. The facts were that a check made payable to the order of "Henry Kenyon, guardian for Frank C. Kenyon," a minor, was presented by Henry Kenyon, the guardian, to the defendant bank. The bank had actual knowledge that the check was the property of the minor. The guardian requested that the proceeds of the check be deposited in the bank in his individual name, and were subsequently checked out or appropriated. The plaintiff was the bondsman for the guardian and was compelled to pay the money to reimburse the minor's estate for the misappropriation.

The bondsman brought the action to recover from the bank. A general demurrer was sustained to the complaint, and the judgment entered accordingly was affirmed. In deciding the case, the question as to the capacity of the plaintiff to sue under the circumstances was raised and was waived by the court in its decision, the case being decided as though the minor himself had been a party plaintiff. In deciding this case the court said, at page 440, *et cet.*

"It is conceded that the bank upon presentation of the check duly indorsed might properly, and without cause for complaint, have paid the full amount thereof to Kenyon in cash. This being true, we conceive no reason preventing it with equal propriety from holding it at his request,

either as a general or special deposit, subject to his order. \* \* \* Appellant's contention, if accepted as applicable to the facts presented, would render banks *ex-officio* trustees in general for all *cestuis que* trust. In our opinion, the law does not impose such duties upon banks or other depositaries of trust funds. The complaint discloses no wrongful act in connection with the transaction on the part of the defendant, and there is no pretense that it was the recipient of any part of the fund embezzled by the guardian. It follows from what has been said that the court did not err in sustaining the demurrer upon the ground that the complaint failed to state facts essential to a cause of action."

The bank, the plaintiff in error here, having accepted the deposits in a specific way from Birdsall, was estopped from refusing to honor his checks on the account, in the absence of a claim by a second party. The defendant in error, Mary Neville, made no claim until after all checks had been honored and paid.

In the case of First National Bank, etc., v. Mason, 40 Am. Rep. 632, the court, at page 633, used the following language:

"The bank held its claim against Thomas & Mason when the plaintiff made his deposits, and they knew, or at least they allege they knew when the deposits were made, that the money so deposited in plaintiff's name belonged to said firm. Yet under these circumstances and with this knowledge they permitted the plaintiff to make the deposit in his own name. Having received it as the money

of the plaintiff and given him credit therefor, the bank is estopped, in the absence of any notice from or claim by the real owner, from disputing the plaintiff's title. Having received the money as the money of the plaintiff, it is bound to pay it to him or upon his order. *Such a contract is implied from the fact of the deposit.*"

To the same general effect, see also Detroit Savings Bank v. Haynes, 87 N. W. 66, and the case of Sparrow v. Stake, etc., Bank, 77 S. W. 168.

**The Deposit Slip at Best Raised a Rebuttable Presumption as to Whose Credit the Bank Should Deposit the Funds.**

It is stated as a general proposition in 7 Corpus Juris, 639, section 321, as follows:

"A deposit slip is a mere acknowledgment by the bank that the amount named has been received."

**Citing**

Union Mills v. Clark, 134 N. Y. 368;  
17 L. R. A. 580;  
32 N. E. 38.

Fort v. Balisberg, etc. Bank, 64 S. E. 405:

"and does not purport to embody the contract between the parties."



Fort v. Balisberg etc. Bank, 64 S. E. 405:

“and cannot affect the rights of third parties under an alleged agreement with the depositor and the bank officers.”

64 S. E. 405 above;

Morse, Sec. 290, page 547, 119 N. Y. S. 763;

Hastings v. Hugo Nat. Bank, 197 Pac. 460.

In American Life Ins. Co. v. Citizens State Bank, 168 Pac. 437 (L. R. A. 1918B 296), the court said:

“A deposit slip executed by a bank and delivered to a depositor, is not a written contract in which all oral negotiations and stipulations are merged, but is merely a receipt constituting *prima facie* evidence that the bank received the sum stated at that time which may be explained or contradicted by parol evidence. Tolcott v. Bank, 53 Kan. 480, 36 Pac. 1066; Bank v. Oak, 134 N. Y. 368, 17 L. R. A. 580, 3 R. C. L. 531 and 571.”

In American National Bank v. Funk, 172 Pac. 1078, (L. R. A. 1918F 1137), the court said:

“A deposit slip issued by a bank is but *prima facie* evidence that the bank received the amount of the deposit on the date shown by the deposit slip. It has the same force and effect as that of any other form of receipt, and is open to explanation as to the conditions surrounding the deposit, and the circumstances under which it was given may be inquired into. Hugh v. First Nat. Bank of Oelwein, 155 N. W. 163; Keen v. Beckman, et al., 24 N. W. 270; First Nat. Bank v. Clarke, 134 N. Y. 368; Davis v. Lenawee County Savings Bank,

18 N. W. 629; *Stair v. York Nat. Bank*, 93 Am. Dec. 759.”

Morse in his fifth edition on Banks and Banking, Sec. 690, page 547, says:

“A deposit ticket may be controlled by parol. It is not a contract, but a memorandum or ‘note to help the memory.’ It is *prima facie* evidence of the bank’s liability though the deposit is not credited on its books.”

### **The Bank Book or Passbook was Prima Facie Evidence of Its Contents.**

The fact that the entries of all of these deposits was in a joint and several passbook, raises a presumption that the money had been so deposited. This presumption is expressly strong as against the depositor because this book or evidence is the one that remains in the possession of the depositor, while the deposit slip remains in the possession of the bank.

Morse in his work on Banks and Banking, fifth edition, section 290, page 546, among other things says:

“A bank book is *prima facie* evidence, but no more, and is open to explanation by parol evidence, or it is not a contract. As between the bank and its depositor, the entry of debits in the passbook and striking a balance are a statement of account, and the delivery of the book to the depositor and its retention by him without objection make it a stated account, and a retention for many months and drawing out the exact balance shown on the book afford clear evidence of a set-

tled as well as a stated account, and *prima facie* establishes the accuracy of the items.

If the depositor acts on faith of the account in a manner he would not have done but for faith in its correctness, the bank is bound, or if the depositor neglects to make such examination as a prudent man would make of his accounts, and the bank, acting in good faith or omitting to act by reason of his silence, puts itself in such position that correction would injure it, the depositor is bound."

The defendant in error does not claim in her evidence, to have ever seen the passbook in question but upon one occasion, and it is doubtful whether this was the passbook which was actually issued by the bank.

The defendant in error should be deemed to be estopped by her conduct in delivering negotiable checks to her supposed husband, permitting him to deposit the same in the bank, clothing him with the *indicia* of absolute ownership, and failing to recover possession of the bank book, examine it or look at it, while the parties were still living together as husband and wife.

The bank did not perform, and had no means of knowing of the secret claim of the defendant in error to these funds. If the funds were the exclusive property of the defendant in error, and she supposed them to be deposited in her name alone, she should at least have examined, if not taken possession, of the passbook, which she concedes she never did.

Even though the defendant in error were a minor at the time, she was within a month of her majority, and

her minority, while technically legal, was substantially passed, and if she had been married, as to all appearance she was and claims to have believed herself, she was *sui juris*. Yet, notwithstanding all this, she was in law competent to transfer title to negotiable paper, and there could have been under the circumstances no stronger evidence given by her of the fact that she had transferred title to the checks in question to her supposed husband.

The bank had no interest in these funds and derived no benefit therefrom. The only check against this account which the bank received for its own account, was one of nine hundred and some odd dollars, and nine hundred dollars of the money deposited to this account was conceded to be the money of Fred Birdsall.

As to the money claimed by the defendant in error, the bank acted strictly in its banking capacity, and had no interest in the money, and it would be inequitable and unjust by any construction of law or equity to make it the guardian of the defendant in error and the inquisitor of their domestic and private affairs, as between herself and her supposed husband.

In conclusion we respectfully submit that prejudicial error has been committed, and that on the whole case the plaintiff in error was entitled to pre-emptory instructions to the jury to find in its favor, and that the relief prayed for herein should be granted.

HAAS & DUNNIGAN,

By H. L. DUNNIGAN,

*Attorneys for Plaintiff in Error, Continental National Bank.*





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IN THE  
**United States**  
**Circuit Court of Appeals,**  
 FOR THE NINTH CIRCUIT.

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Continental National Bank, a Cor-  
 poration,

*Plaintiff in Error,*

*vs.*

Mary Neville,

*Defendant in Error.*

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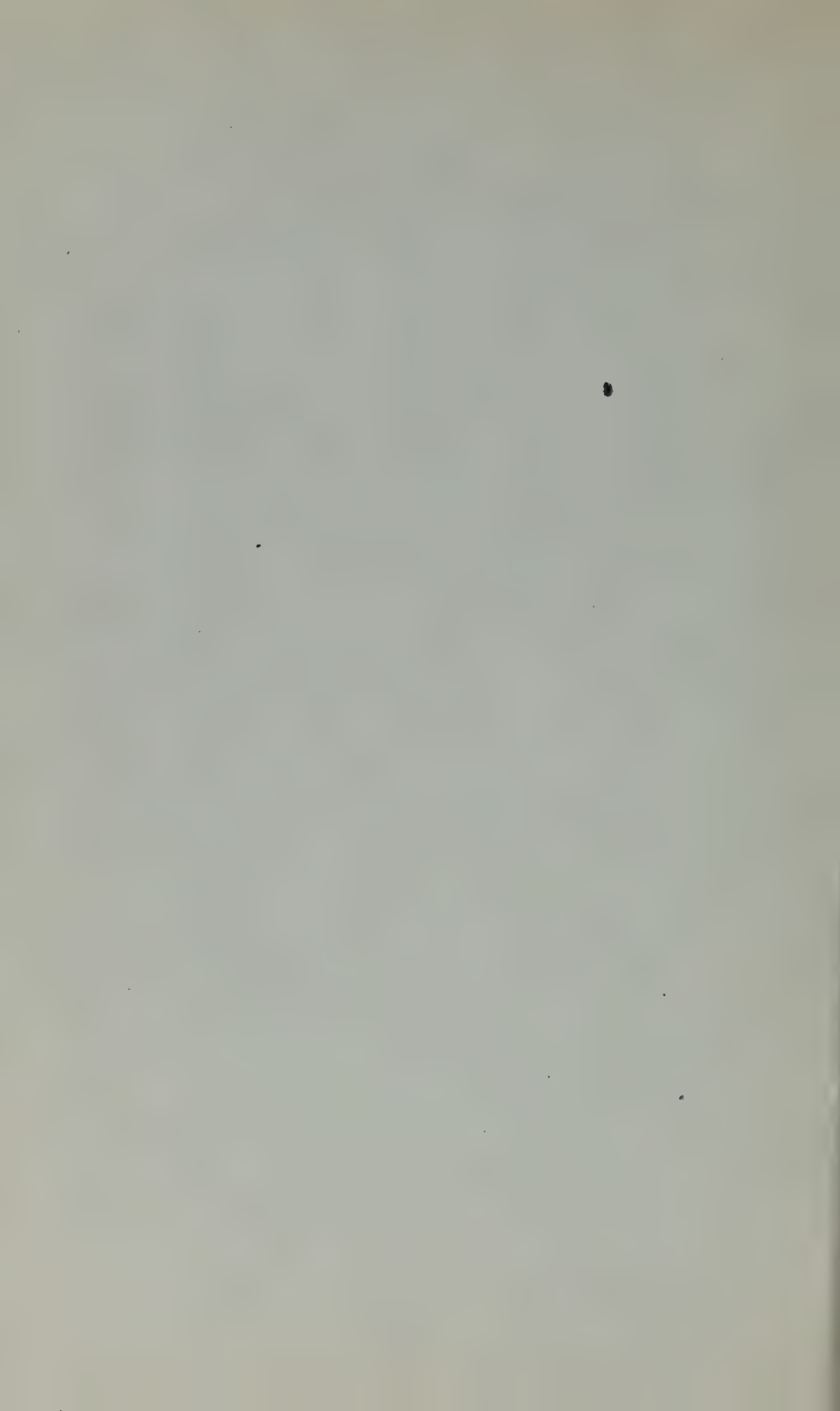
ANSWERING BRIEF OF DEFENDANT IN ERROR.

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GEORGE B. ROSS and

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*Attorneys for Defendant in Error.*



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**ANSWERING BRIEF OF DEFENDANT IN ERROR.**

The action below was against the bank and one Fred Birdsall to recover \$4400.00 deposited in the bank and drawn out by Birdsall. The third count of the complaint alleged that Mary Neville was a minor at the time of the transactions mentioned in the complaint; that Birdsall, shortly before the opening of the account with the bank entered into a bigamous marriage with Mary Neville (he having a wife living from whom he had not been divorced) for the purpose of procuring the money and property which constituted said Mary's estate; that Birdsall was an intimate friend and asso-

ciate of various officers of the bank; that Birdsall caused the employees and officers of said bank to enter upon their books containing said account of Mary Neville Birdsall the name of Fred Birdsall, so as to make it appear that said account was the joint account of said Mary and Fred; that said Birdsall caused said employees and officers of said bank to so alter and change said books and account so that Birdsall could withdraw Mary's money from the bank and convert it to his own use; that the employees and officers of said bank so negligently and carelessly conducted the business of said bank that they did, at the request of said Birdsall alone so alter and change their said books and the account of said plaintiff by adding the name of Fred Birdsall thereto, without the knowledge or consent of said plaintiff and without any authority whatever from plaintiff so to do; and they negligently and carelessly paid out the funds and estate of said Mary without her knowledge or consent or authority, upon checks signed by the defendant Birdsall only and drawn against her account without her knowledge or consent. That said Mary attained the age of eighteen years after all the transactions complained of.

This phase of the case seems to have been overlooked by appellant.

#### I.

### STATEMENT OF FACTS.

We cannot agree to the conclusions of counsel from the evidence, especially as it is self-evident the jury

did not believe the evidence from which those conclusions are drawn.

The first item of the account, September 21st, 1920, \$500.00, was a check sent Mary by her mother, Kate Neville. Mary testified:

"I endorsed the check and gave it to the defendant Birdsall to deposit in the Continental National Bank *for me.*" [Tr. p. 26.]

Birdsall took the check and brought her back a pass book that had the \$500.00 entry in it and the name on it was "Mary Neville Birdsall." It did not have the name of Fred Birdsall on it. And he brought her a signature card that she did not sign and it was lost. [Tr. p. 27.]

A few days afterward Birdsall took Mary to the bank and introduced her to Frank Nichols [Tr. p. 65], who said he was president, and Nichols gave her another card and she signed it. [Tr. p. 28.] The signature card states on its face it is "*individual*" and was signed by Mary Neville Birdsall only; Birdsall did not sign a card that day, and Mary did not see a card he had signed that day. But she afterward saw a card signed by him (after the transactions were all closed) and it also was "*individual.*" Both signature cards were prepared and received by Frank H. Nichols, president of the bank [Tr. p. 64], and he introduced Fred Birdsall to the bank and accepted both signature cards. [Tr. pp. 28-29.] The deposit ticket for the first \$500.00, Sept. 21, 1920, which was produced when Mary Neville first came to the bank and



“raised a question as to whether there was a joint account,” was in the handwriting of the president, Nichols. The bank had a “New Account Department” whose duty it was to handle new accounts. But notwithstanding this fact the president, Nichols, testified that he made an exception to this rule for Birdsall and opened the account himself. [Tr. p. 63.] When Birdsall deposited the \$2500.00 check of Selover, given to Mary Neville Birdsall for the automobile her mother had given her, he took her to the bank with him. He made out the deposit ticket in her name only, and she saw him do that. It was after banking hours, and Birdsall took the deposit to a teller who received the check and gave Birdsall a *duplicate deposit slip* because Birdsall did not have the bank book with him. [Tr. pp. 29, 47 and 48.]

This \$2500.00 was afterward entered on the pass book by Nichols, the president. [Tr. p. 65.] Nichols testified that he received this deposit personally, and that Birdsall had the pass book with him and he then entered it therein. [Tr. p. 64.] The jury did not believe him.

That the original ledger sheet of the bank showing this account had been altered, was admitted by Nichols, changing the word “and” to “or,” so that checks against the account by Birdsall, only, could be honored. [Tr. p. 69.]

The course of the account itself tells the story of the looting of Mary. \$500.00 check from mother is

deposited Sept. 21. [Tr. pp. 60 to 62.] This drops to a balance of but \$57.85 in eight days. Sept. 29, Birdsall borrowed \$400.00 from the bank and deposited it. It was placed in this account. He checked out of the account that same day on a certified check \$400.73 to pay freight on an automobile. [Tr. pp. 69 and 70; 59-60.] Only two days afterward the automobile was sold to Mr. Selover for \$2500.00 (Oct. 1), when the balance in the account was but \$32.12. Oct. 2, Birdsall gave a check for \$900.76 to the Continental National Bank [Tr. p. 39] to pay out of Mary's money, so realized from the sale of her automobile, his loans to that bank, one of which was secured by the signature of Frank R. Strong [Tr. pp. 69 and 70], and the other the \$400.00 loaned him and placed in Mary Neville's account so he could draw out \$400.73 to pay freight on the automobile.

Birdsall borrowed \$400.00 from the bank and deposited it in Mary's account, drew a check for \$400.73, which he procured to be certified, payable to the Southern Pacific Co. and dated the same day as the loan and deposit [Tr. pp. 59 and 60]; Nichols knew when Birdsall procured this check it was to pay freight on the automobile [Tr. pp. 69-70]; two days afterward Selover bought the automobile and gave \$2500.00 check to Mary; this was deposited by Birdsall and the bank was immediately paid the \$400.00 advanced to pay the freight and the \$500.00 upon which Strong was security. Oct. 4, Birdsall deposited a check for \$500.00.

Was this \$500.00 his commission from Selover for the sale of the automobile? The evidence is silent on that, except for the inference that may be drawn from the fact that Birdsall was unable to raise seventy-three cents September 29 without checking on Mary's account. The automobile was sold Oct. 1, and Oct. 4 Birdsall had and deposited a check for \$500.00 [Tr. p. 50] and on the same day paid to the bank by check \$2035.00. [Tr. p. 41.]

Oct. 4 another \$500.00 check from the mother, payable to Mary, endorsed by her "For deposit only," was deposited, and Birdsall produced the \$500.00 check which was also deposited Oct. 4. On Oct. 4, \$2035.00 was checked to the Continental National Bank for some purpose, and this and some small checks, left Mary with a balance of \$9.85 out of \$3500.00, in two weeks. Of this sum Mary had drawn just three checks for \$113.60 for clothing, and the remainder, \$3386.40, is the amount of the jury's verdict and of the judgment.

In order to get the full view of what happened to Mary, let us get the "*dramatis personae*."

Mrs. Kate Neville, mother and guardian of Mary, and who gave her \$1000.00 and an automobile.

Mary Neville, seventeen years old, inexperienced country girl, who supposed she was the bride of Fred Birdsall.

Fred Birdsall, fifty-year-old man of the world, married and needing the money, and in the employ, as a

real estate agent, of the firm of Strong, McGrath and Selover, with offices at 1015 Marsh-Strong Building [Tr. p. 31], the building where the bank was located.

Frank R. Strong, stockholder and director of Continental National Bank, partner of Selover, employer of Birdsall, and security on Birdsall's note to Continental National Bank for \$500.00. [Tr. pp. 70-72.]

Mr. Selover, partner in business with Strong, employer of Birdsall, purchaser from Birdsall of Mary's automobile for \$2500.00 [Tr. p. 72], out of which Birdsall's debts to the bank, on \$500.00 of which Strong was security, were paid the very day the \$2500.00 check was deposited.

Frank H. Nichols, president of Continental National Bank, of which Frank R. Strong was a director and stockholder, friend of Birdsall, accommodating Birdsall with loans, taking Birdsall's statement about the deposit of checks payable to Mary (even when the check is endorsed "For deposit only" [Tr. p. 30]), with no authority whatever from Mary, either oral or written [Tr. pp. 52, 72]; and now attempting to save the bank from liability for his negligence in so handling the account that Birdsall had unlawfully looted it. And having actual notice that Birdsall was without funds of his own, because the bank had loaned him \$500.00 upon the note for which one of its directors and stockholders was security (Strong), and also because he loaned Birdsall \$400.00 to pay freight on the automobile of Mary, of course, with the understanding that



Birdsall should immediately sell the automobile and repay the bank out of those funds. And, in order that Birdsall could accomplish these things, it was necessary that he should handle Mary's funds. Nichols so arranged the matter with full notice of the facts.

## II.

The entire argument of plaintiff in error is based upon the truthfulness of the testimony of Frank H. Nichols and the untruthfulness of the testimony of Mary Neville. But it is evident that the jury believed Mary and disbelieved Nichols, because that would justify the verdict.

The reason the jury disregarded the testimony of Frank H. Nichols is self-evident, even from the transcript. But in addition the jury saw him on the stand and were doubtless impressed by his shifty testimony, and his contradiction of other testimony, and his apparent interest in the result of the action.

Nichols testified that Birdsall came to him and opened the account as a joint account in the names of himself and Mary and that he (Nichols) wrote out the deposit slip in both names and made out the pass book in both names September 21, 1920. [Tr. pp. 63 to 66.]

The deposit ticket produced by the bank reads plainly "Fred Birdsall or Mrs. Mary Neville Birdsall [Tr. pp. 50-57]; but the original ledger sheet shows an alteration, being written in pencil and typewriting "Fred Birdsall and Mary Neville Birdsall" then the "and" changed to "or". [Tr. p. 69.] No attempt was made



by defendant to show when this change was made in the books. The original deposit ticket was left with the bank and if the bank would change its book, it would be a reasonable inference they would also change the deposit ticket, the ticket being in Nichols' writing and he having access thereto.

The deposit ticket bears no date and it is the only one which has a paid stamp on it, being stamped "Paid Sep. 21, 1920." As a matter of fact deposit tickets are not paid and it is not claimed this one was.

All the other deposit tickets were either in the name of Mary Neville Birdsall, or of Fred Birdsall; none of them in both names. Maurice J. Wolfe, auditor of the bank, testified that he did not see this joint ticket until October 15 or 16 [Tr. p. 62], after the question of a joint account was raised.

Mary testified that the pass book was brought to her by Birdsall and it had no name on it but her own [Tr. p. 27], and it would be a natural inference that if the pass book when brought to her had no name but hers, the original deposit ticket had no name but hers, also, and that the book and deposit ticket were both changed by Nichols, because both were in his handwriting.

Again: Nichols testified that he received the \$2500.00 deposit ticket and check from Birdsall and entered the \$2500.00 on the pass book at the time. [Tr. pp. 64-65.]

Mary testified that she got the \$2500.00 check from Selover; that it was payable to her and she indorsed

it; that she and Birdsall went to the bank together to deposit it; that Birdsall made out the deposit ticket *in her name only* and delivered it to a teller; that it was after banking hours; that they did not see Nichols; that Birdsall did not have the pass book with him, and that the teller delivered a duplicate of the deposit ticket to Birdsall. [Tr. pp. 27, 47-48.]

Again: The signature card prepared by the witness Nichols for Mary to sign specifically stated that it was "individual"; nothing appears suggesting a joint account, or joint signature, or either of two signatures. [Tr. p. 28.]

Again: The witness Nichols testified that it was not customary in cases of joint accounts to have both signatures on the same card [Tr. p. 66], and floundered on the point on cross-examination and admitted they made such cards. [Tr. pp. 67-68; 73.]

Again: The witness Nichols testified that it was customary where a bank had a joint account, and a deposit ticket was made out in the name of either of such persons, to credit the deposit to the joint account without any orders or request. [Tr. pp. 67; 71.] This testimony cut the bank either way, *i. e.*, either it was untrue as the jury evidently was convinced, in which case the departure from custom in this case makes the bank liable; or it was true, in which case the custom was so negligent as to render the bank equally liable.

Again: The witness Nichols testified that his bank did not require the signatures of both depositors to a

check when the account was in the name of one "and" the other. [Tr. pp. 71-72.] This evidence shows negligence which renders the bank liable.

Again: Not one of Mary's checks were indorsed by Fred Birdsall. If they were deposited in Mary's account this was proper. But if they were deposited in the joint account, as claimed by defendant, then the name of Fred Birdsall on the back would show the change of ownership and tend to protect the bank in its action.

### III.

Counsel say, brief p. 14:

"There is not in the evidence, a scintilla to indicate that the bank had any notice of the intention of the defendant in error to have these moneys deposited to her separate account or credit."

The signature card found in the bank, prepared by the president of the bank and signed by Mary, as both Mary and Nichols testify, acknowledges that the bank was dealing with her as an individual, and not as joint owner. Besides this the pass book as originally ade, and the deposit slip prepared in her presence in her individual name for the \$2500.00 check, which was hers, and in her presence delivered to defendant's teller, and the duplicate deposit ticket in her name only delivered in her presence to Birdsall for her, and each of her other checks bearing her indorsement only, one "for deposit only" and her deposit tickets show that the bank had full knowl-

edge of the situation, and that the account was hers only.

That the bank had knowledge that it was necessary to have both names on one card is shown by the card prepared for Birdsall which shows at the place for signature "Fred Birdsall *or*"— [Tr. p. 29.]

The truth is as the jury found, that, to say the very least, the bank was so negligent in permitting Fred Birdsall to draw this money without any authority from Mary Neville, the owner, so to do, that they must repay it.

The jury was not only fully justified in finding a verdict in favor of Mary Neville, but there was evidence of a compelling nature that demanded such a verdict.

It is said by the court in *United States v. 323 Packages of Kil-Tone*, 279 Federal 398, 401:

"It is beyond the power of this court to re-examine the facts as found by the jury. If the court committed no substantial error upon the trial, the verdict and judgment entered thereupon cannot be disturbed."

See

*American Trading Co. v. North Alaska etc. Co.*,  
248 Fed. 665, 667.

"Federal Appellate Court cannot disturb the finding of a jury on a question of fact, if there is any competent evidence to support the verdict."

*Tate v. Baugh*, 264 Fed. 892;

*Manf. Life Ins. Co. v. Brennan*, 270 Fed. 173;

*John A. Crowley Co. v. Clark Equip. Co.*, 263  
Fed. 58.



IV.

It is erroneous to say the instructions of the court to the jury were contradictory. In giving the instructions the court very carefully adapted them to the evidence in the case.

There was evidence from which the jury might have believed that Mary Neville indorsed the checks and delivered them to Fred Birdsall in such manner that the bank would have been protected in paying them to Birdsall, or depositing them as he directed. But there was also evidence from which the jury might have believed, and evidently did believe that the bank had "information which would put them upon notice to the contrary." The jury evidently believed that the account was originally opened in the name of Mary Neville Birdsall only, and the deposit was in her name alone.

Appellant has separated three portions of the instructions from their surroundings and argues that they are contradictory and asks a reversal on that ground.

In *Seaboard Air Line R. Co. v. Padgett*, 236 U. S. 668, 672, 59 L. Ed. 777, 780, the Supreme Court holds:

"Whether the instructions could have produced misconception in the minds of the jury is not to be ascertained by merely considering isolated statements, but by taking into view all the instructions given and the tendencies of the proof in the case to which they could possibly be applied."



That the instructions are to be construed together, and not piece meal, is held in

Puget Sound etc. v. Schleif, 220 Fed. 48;

Stevenson v. Atlantic Terra Cotta, etc., 230 Fed.  
14, 22;

and many other cases.

This is the long settled rule of the federal courts.

The court instructed the jury fully and fairly.

Among other things the court said:

“The burden of proof is on the plaintiff. The plaintiff must prove her case by a preponderance of the evidence. Among the things that the plaintiff must prove is the fact that the money for which she sues was her separate property and that the deposits made in the bank *were made for her sole use and benefit.*” [Tr. p. 75.] \* \* \*

“Any entry by a bank in a pass book of a depositor in the usual form crediting him with a certain sum deposited does not constitute a written contract between the parties but is merely evidence in the nature of a receipt for the deposit and may be explained or contradicted by oral testimony.” [Tr. p. 77.] \* \* \*

“The usage of banks in respect to the powers and duties of its officers so far as such usage is known to the business public enters into and qualifies the contracts made by such banks through their officers. Custom and usage, if reasonable, have a binding force between the bank and the customer.” [Tr. p. 77.]  
\* \* \*

“This is an action prosecuted by the plaintiff to recover from the defendant Continental National Bank and Birdsall certain moneys alleged in the complaint to

have been deposited with said *defendant bank in the name of or for the account of plaintiff, Mary Neville Birdsall, or Mary Neville.*" [Tr. p. 78.]

"If you find from the evidence that any of said sums of money were deposited to a separate account of the plaintiff, Mary Neville Birdsall, then your verdict should be for said plaintiff for the amount of money so deposited less the aggregate amount of checks which you may find from the evidence to have been drawn on said account by said Mary Neville Birdsall and paid by said defendant bank." [Tr. p. 79.] \* \* \*

"The endorsement or assignment of a negotiable check by an infant or minor passes the property therein notwithstanding that from want of capacity the infant or minor may incur no liability thereon. That is to say, by incurring a liability means that they are not liable on an endorsement.

"I have stated to you that a minor cannot bind (himself) by an agent, *and any instruction given to the defendant bank by Birdsall would not bind the plaintiff except to the extent that the endorsement by her to Birdsall would create an apparent ownership in the said Birdsall of said check. To that extent she had a right and was bound by such apparent ownership when presented to the bank and the bank had a right to draw any reasonable inference from that fact, that the said Birdsall had a right to direct how the deposit should be made but had no right to give such directions to the bank except by virtue of that fact.*

"*In receiving said deposit the defendant bank had a right to assume that any check presented to said bank for deposit was owned by the party presenting the check, provided the check was duly endorsed without limitation of the endorsement by the payee thereof and*

*the bank had no information which would put them upon notice to the contrary.” [Tr. pp. 80-81.] \* \* \**

*“In determining whether or not any particular item was deposited to the credit of the plaintiff or to the joint or several credit of the plaintiff and Fred Birdsall you shall determine from the evidence what was the agreement of the party making the deposit in the bank.*

*“In using the word ‘the party may deposit’ you shall not understand that I am referring to Fred Birdsall as an individual acting in the case, but you are to determine whether the transaction showed that such deposit was made by Mary Neville or by Fred Birdsall for her use and benefit.*

*“In determining any question in the case you shall take into consideration all the evidence introduced and the circumstances surrounding any particular facts or act of the parties.*

*“The evidence introduced here shows a pass book of the bank made out showing that the deposits were made to the account of Fred Birdsall or Mary Neville Birdsall. The plaintiff contends that she never saw that pass book with the name Fred Birdsall written in it. A question for you to determine is whether or not, upon the making of said first deposit, a different pass book was made out by the bank and that she saw such different pass book made out by the bank. If the only pass book that the bank made is the one introduced in evidence and that pass book was tendered at the time of making of any deposit you have a right to take that into consideration in determining the question as to whether or not said sums were deposited to the plaintiff’s credit or to the joint or several account of Fred Birdsall and the plaintiff.” [Tr. pp. 81-82.] \* \* \**

*“A deposit slip made out by a party and presented*

to the bank at the time of the deposit is a direction to the bank to credit said deposit to the name of the party appearing on the deposit slip and the bank has no legal right to place said money to the credit of any other person or persons. *The deposit slip, however, may be controlled by other evidence; that is to say, the deposit slip is not conclusive as a direction to the bank to whom the deposit shall be made. Oral directions may be given or other instructions may show that the party intended the deposit should be made in the name of some other party than that on the deposit slip.*

“If you find from the evidence that the plaintiff did not know that there was a joint and several account in the defendant bank, then she would not be bound by a deposit of her money in the bank in such joint and several account. The presentation of a pass book to the bank at the time of making a deposit is evidence of what the depositor intended the bank to do and should be considered in connection with the deposit slip. Such book, however, would not bind the plaintiff in any way unless she knew of the existence of such pass book.

“If Fred Birdsall presented a check to the bank which was payable to Mary Neville Birdsall and duly endorsed by her, and at the same time that said check was presented for deposit, a deposit slip to the effect that said money should be deposited to Mary Neville Birdsall, then the bank had no right to credit such deposit to the joint and several account of Fred Birdsall and Mary Neville Birdsall but should have credited it solely to Mary Neville Birdsall.” [Tr. pp. 82-83.]

The instructions of the court, far from being contradictory merely accommodated the law to the evi-



dence as the jury might determine the facts to be. If there was no dispute as to the facts, the law could be stated by the court succinctly and with no provision for variation. But the dispute as to facts here was radical and irreconcilable. The jury must determine whom they would believe. They were told they must consider all of the evidence in arriving at a verdict. If they believed one line of evidence the rule of law would be thus; if they believed the other line then the law would be so.

This is the approved method of giving the law to a jury. It was not the law given, but it was the evidence, that was contradictory.

In *Memphis St. Ry. Co. v. Pierce*, 257 Fed. 659, 662, the court holds:

“We must consider the instructions of the court as a whole. So regarded, they are found to conform to well-settled law and there is no ground for inference that the jury was misled. We see no fair opportunity to presume that, if the criticisms of plaintiff in error to this charge were met in a new presentation of the same facts to a jury, the verdict might reasonably be otherwise than it was here.”

In *Massee v. Williams*, 207 Fed. 222, 234, the court said:

“It was the court’s duty to charge the law arising upon the facts as applicable to such facts so as to aid the jury in arriving at a correct conclusion.”



V.

The entire argument of the brief at "III," pages 22 to 27 inclusive, is based upon the assumption that the testimony of defendant below was and is true and that plaintiff's testimony was and is untrue. The finding of the jury precludes such an assumption. This instruction, taken in connection with other instructions of the court, merely states that if Fred Birdsall came with a check made payable to Mary Neville Birdsall and duly indorsed by her and presented it at the bank with a deposit ticket to the effect that said money should be deposited to Mary Neville Birdsall the bank had no right to disregard these instructions and deposit in some other account. This is undoubtedly the law. Of course if Birdsall had given some other instructions in addition to the presentation of the check and deposit slip, that might have had a different effect, as the court had repeatedly told the jury in other parts of the charge. [See Tr. pp. 75, 76, 78, 79, 80, 81, 82, 83.]

VI.

Counsel claim (Brief p. 23) that the crediting of the deposits of Mary's money to the joint account was justified by the mere presentation of the deposit ticket which directed the deposit to the account of Mary Neville Birdsall, and say that the deposit to the joint account was a deposit to the credit of Mary Neville Birdsall. The result as depicted by the evidence disproves the claim. She put in \$3500.00, drew out

\$113.60, and had a balance in her account of \$9.85. It is well settled law that the relation between depositor and bank is one of contract. (3 R. C. L., p. 516.) *There is not even a pretence of evidence in this case that Mary Neville ever authorized or even knew that her money was deposited in a joint account.* Every particle of direct evidence on the subject is to the effect that she did not know that fact. She was led to believe by her husband and by the bank that her account was individual.

## VII.

Counsel gives certain reasons why the instruction was erroneous. (Br. p. 24.) We answer seriatim:

(a) The fact that the check was payable to Mary Neville Birdsall did raise so strong a presumption of ownership in her favor that her indorsement was required to procure its payment or acceptance by the bank as a deposit. It may be that her indorsement, without any other circumstances except that the check was in the possession of Fred Birdsall, would be *prima facie* evidence that the check belonged to Birdsall. But there is no pretense that he claimed to own the check. He did not endorse it. He did not direct its deposit to the joint account. He made out the deposit ticket in the name of Mary Neville Birdsall and delivered both to the bank. The bank thereupon credited the deposit to a joint account and paid it out on Bird-sall's check.

(b) The instruction merely states that if the transaction consisted of the presentation by Birdsall of a check payable to Mary and endorsed by her, accompanied by a deposit ticket in her name only, 'with nothing more,' the bank had no right to place the deposit in a joint account.

(c) The instruction excludes nothing. It leaves the matter to be determined by the jury.

The case at bar is of a similar nature to that of *Brown v. Dougherty*, 120 Fed. 526; and see *Rodgers v. The Bank of Pike County*, 69 Mo. 560;

*Bates v. First Natl. Bank*, 89 N. Y. 286.

In the case of *Bates v. Natl. Bank*, *supra*, the holding was that the indorsement of the checks in blank, and the delivery thereof to the husband were sufficient to make him the apparent owner, but when he made the deposit in the name of his wife, and took the pass book in her name, it disclosed the fact of his agency only to the extent of making the deposit for her. The situation then was that the bank was bound to recognize the wife as the owner and pay only upon her order.

In the case at bar the evidence was conflicting as to whether the original deposit was in the wife's name and the jury evidently found it was, so the bank had notice that Birdsall was the agent of his wife for deposit only and one of the checks was so indorsed by her.

A man who deposits money in a bank in his wife's name may not check it out in his own name if it is her separate property, without her express authority. A bank which permits it is liable to the wife.

Brown v. Daugherty, 120 Fed. 526, 533-536;

Bates v. Bank, 89 N. Y. 286;

Honig v. Bank, 73 Cal. 464, 469;

Kerr v. Bank, 158 Pa. St. 305;

Armstrong v. Johnson, 93 Mo. App. 492;

Paton, Legal Opinions, p. 304, Secs. 1333, 1339.

See the case of Honig v. Bank, 73 Cal. 464, where a deposit was made by an agent in the name of the principal "by" the agent and afterward drawn out by the agent signing the principal's name by the agent. The bank was held liable to the principal.

The deposit slips or tickets introduced in this case were writings prepared by the agent of the depositor to accompany the deposit and were a memorandum showing what the deposit was, its amount and was a written direction, or instruction, to what account the money was to be credited. These slips were not prepared or issued by the bank. The bank received them from the depositor's agent and retained them as a part of its record of the transaction. The authorities cited by counsel have no reference whatever to the papers introduced in evidence in the case at bar and referred to in the record and briefs as "deposit slips" or "deposit tickets."

It is evident that the jury believed that Birdsall was made the agent of Mary merely to deposit her checks, and that the pass book was originally made out in her name only, and that when Birdsall showed it to her it was not a "joint and several" pass book.

"Where it is evident that a correct result has been reached, questions concerning the correctness of particular rulings, not affecting such result, are immaterial."

Weiner v. Union Trust Co., 261 Fed. 709.

There is no prejudicial error in the record. The claim of estoppel is unsupported by equity, law or fact. The judgment should be affirmed.

GEORGE B. ROSS and  
NEWBY & PALMER,  
*Attorneys for Defendant in Error.*





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IN THE  
United States  
Circuit Court of Appeals,  
FOR THE NINTH CIRCUIT.

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Continental National Bank, a corpora-  
tion,

*Plaintiff in Error.*

*vs.*

Mary Neville,

*Defendant in Error.*

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Petition for Rehearing After Decision by the Court.

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HAAS & DUNNIGAN,

By H. L. DUNNIGAN,

*Attorneys for Plaintiff in Error, Continental National  
Bank.*



IN THE  
United States  
Circuit Court of Appeals,  
FOR THE NINTH CIRCUIT.

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Continental National Bank, a corporation,

*Plaintiff in Error.*

*vs.*

Mary Neville.

*Defendant in Error.*

---

**Petition for Rehearing After Decision by the Court.**

*To the Honorable Circuit Court of Appeals and to the  
Honorable Judges Thereof:*

Comes now the plaintiff in error in the above entitled action, and petitions the court to set aside and vacate the decision and opinion heretofore rendered in the above entitled cause, on the 8th day of January, 1923, and to grant a rehearing thereof, and that the writ of error pending herein be reconsidered by the court.

This petition is based upon the following grounds, to-wit:

*First:* That the court erred in holding that the giving of the following instruction was not erroneous, to-wit:

“If Fred Birdsall presented a check to the bank which was payable to Mary Neville Birdsall, and duly endorsed by her, and at the same time that said check was presented for deposit, a deposit slip to the effect that said money should be deposited to Mary Neville Birdsall, then the bank had no right to credit such deposit to the joint and several account of Fred Birdsall and Mary Neville Birdsall, but should have credited it solely to Mary Neville Birdsall.”

*Second:* That the court erred in holding and deciding that said instruction could be read in connection with other instructions properly given, as a part of an entire charge, and not as a distinct and separate charge.

We respectfully urge that the opinion is in error on a question of law insofar as it is held that there was no conflict in the instructions given to the jury by the trial judge.

Set out below will be found the instructions which we urge are in conflict, and which we have designated “A” and “B” respectively. These are copied from transcripts of record, pages 82 and 83.



(A). "In receiving said deposit the defendant bank had a right to assume that any check presented to said bank for deposit was owned by the party presenting the check, provided the check was duly endorsed without limitation of the endorsement by the payee thereof, and the bank had no information which would put them upon notice to the contrary."

"The deposit slip, however, may be controlled by other evidence, that is to say, the deposit slip is not conclusive as a direction to the bank as to whom the deposit shall be made. Oral direction may be given where other instructions may show that the party intended the deposit should be made in the name of some other party than that on the deposit slip."

(B). "If Fred Birdsall presented a check to the bank which was payable to Mary Neville Birdsall, AND DULY ENDORSED BY HER, and at the same time that said check was presented for deposit, a deposit slip to the effect that said money should be deposited to Mary Neville Birdsall, then the bank had no right to credit such deposit to the joint and several account of Fred Birdsall and Mary Neville Birdsall, but should have credited it solely to Mary Neville Birdsall."

The instruction above set forth, entitled "(B)", is a proposition complete and distinct in itself, as distinguished from any other part of the proceeding or following instructions. It contains the following exclusive and definite conditions:

(a) That the check was originally payable to plaintiff;

(b) That it was endorsed by plaintiff; and

(c) That the deposit slip was in the name of plaintiff.

Every one of these propositions was conceded to be true at the trial. The instruction expressly excluded the following propositions:

(v) That there was presented with the deposit slip a joint and several passbook;

(x) That the person presenting the check, deposit slip and passbook, requested that the deposit be entered upon the joint and several passbook;

(y) That the bank entered such deposit in the joint and several passbook and account in good faith, relying upon the endorsements; and

(z) That it was a custom among banks to accept deposit slips in the name of either of the joint depositors and credit them to the joint account.

Each of the latter propositions (v, x, y, z) excluded by the plain import of this instruction, was supported by evidence before the court.

The jury may have believed any one or all of the propositions excluded from this instruction, and would yet have been compelled to follow the court's mandate and render a verdict, as it did, for the plaintiff.

On the other hand, the court, in other parts of its instructions, told the jury that every one of the excluded propositions were a good ground for defense.

That we are correct in urging that this instruction was contradictory and necessarily misleading to the jury

is rendered more evident by the fact that the other instructions were given as abstract principles of law, while this particular instruction sets up a particular state of facts, giving the names of the parties and states that if these specific facts (a, b, c) are true (and they are not disputed), the verdict must be for the plaintiff.

As a further illustration of the correctness of the position which we take, let us assume that the court had stated in this instruction merely that if the original payee of the check had been the plaintiff, the verdict should be for the defendant. This would certainly be a bad instruction. Or if the court had instructed the jury merely that if the deposit had been made out in the name of the plaintiff, the verdict would have to be for the plaintiff. This would certainly be a bad instruction.

The only difference between this and the instruction as given, is that the one suggested omits only an *additional* fact.

Had the instruction contained any limitation, as if it had read:

“If you find the following to be the only facts in the case,”

then the instruction would have been reconcilable with the other instructions. Or if the instruction had read:

“If Fred Birdsall presented a check to the bank which was payable to Mary Neville Birdsall, and duly endorsed by her, and at the same time said check was

presented for deposit, a deposit slip to the effect that said money should be deposited to Mary Neville Birdsall, *'then in the absence of other circumstances to control the disposition of the fund,'* the bank had no right to credit such deposit to the joint and several account of Fred Birdsall and Mary Neville Birdsall, but should have credited it solely to Mary Neville Birdsall,"

thus interpolating in the instruction, the very apt language used by the court in its opinion, to explain the meaning of the instruction, it would have been reconcilable with the balance of the charge.

Had such language been interposed into the instruction, its meaning would have been different, but without such language, its meaning could not have been understood by the jury in the light stated in the opinion of the court. The jurors were laymen, and not jurists, and could not be expected to add to or imply from the positive and unconditioned language of the trial judge, those things which the trial judge should have interposed by way of limitation, and which he did not interpose.

The Federal authorities require only that an exception to instructions shall be sufficiently definite to call the judge's attention to the particular matter objected to in order that he may have an opportunity to correct it.

First National Bank v. Hindman, 186 U. S. 483;  
Morse v. Tilotson & Walcott Co., 255 Fed. 340.

It will be noted, however [Tr. page 84] that counsel for plaintiff in error specifically excepted to these instructions on the special ground of conflict.

### **Inconsistent or Contrary Instructions Constitute Reversible Error.**

In 38 Cyc., page 1604, the following rule is given:

“Conflicting or contradictory instructions furnish no correct guide to the jury, and the giving thereof is erroneous. Instructions of this character are misleading, as the jury are not supposed to know when the judge states the law correctly and when incorrectly; and the jury should not be left to reconcile conflicting principles of law. The giving of contrary instructions is ordinarily held ground for reversal. Error in giving incorrect instructions is not cured by giving correct instructions in conflict with them. The error can only be cured by an explicit withdrawal of the erroneous instruction. Where instructions are inconsistent and contradict each other, it is usually impossible to say whether the jury was controlled by the one or the other.”

In 2 R. C. L., page 260, it is stated:

“The doctrine of harmless error is seldom applied to the giving of conflicting instructions, and as a general rule the vice of a wrong rule in a charge is not extracted by the fact that the right rule is also given, because it is impossible to tell by which rule the jury was governed.”

Armour & Co. v. Russell, 144 Fed. 614;

6 L. R. A. (N. S.), 602;

Deserant v. Ceriolllos Coal Co., 178 U. S. 409.



The rule is laid down in Hayne on New Trial and Appeal, Vol. 1, at page 648 as follows:

“Where the instructions on a material point are contradictory, it is impossible for the jury to decide which should prevail, and it is equally impossible, whatever the verdict, to know that the jury was not influenced by that instruction which was erroneous, as the one or the other must necessarily be where the two are repugnant.”

This rule as laid down by Hayne is in practically the exact words used by Crockett, J., delivering the opinion in *Brown v. McCallister*, 91 Cal. 48. Our Supreme Court has consistently followed this rule throughout the California decisions, a number of which were cited and reviewed in our opening brief.

In the case of *Armour & Co. v. Russell*, *Supra*, the appeal arose directly over exceptions taken to request of counsel for the giving of certain instructions which were offered apparently to correct or add to those given by the trial judge.

Justice Sanborn of the Circuit Court of Appeals, 8th circuit, who wrote the opinion, states as follows:

“It is true that in some parts of the charge the court stated the true rule on this subject to the jury. The presumption, however, is that error produces prejudice. It is only when the fact so clearly appears as to be beyond doubt that an error challenged, did not prejudice and could not have prejudiced the complaining party; that the rule that error without prejudice is no ground for re-

versal is applicable." Citing numerous Federal and U. S. cases.

This further excerpt is taken from page 616 of the opinion:

"The vice of a wrong rule in a charge of the court is not extracted by the fact that the right rule was also given therein, because it is impossible to tell by which rule the jury was governed."

Railway Co. v. Needham, 52 Fed. 371;

Railroad Co. v. Farr, 56 Fed. 994.

In the case of Chicago, S. P., M. & O. Co. v. Kroloff, 217 Fed. Rep. 525, the court stated:

"A refusal of the court to grant a specific request to withdraw from the jury one of several specific charges of negligence on which the plaintiff is seeking to recover, is fatal error, if there is no substantial evidence to sustain that charge, although there may be evidence to sustain others, because the presumption is that error produces prejudice. The Appellate Court cannot know that it was not upon that baseless charge that the jury founded its verdict." Citing a large number of Federal cases.

In the case of *Todd v. U. S.*, 221 Fed., at page 208, we quote from the opinion as follows:

"Counsel for plaintiff contended that the error of the admission of this petition is so slight and technical, and the guilt of the defendant is also conclusively proved by other evidence that the error should be deemed without prejudice to the defendant, and the judgment against him should

be affirmed. BUT THE LEGAL PRESUMPTION IS THAT ERROR PRODUCES PREJUDICE, IT IS ONLY WHEN THE FACT SO CLEARLY APPEARS AS TO BE BEYOND DOUBT THAT AN ERROR WOULD NOT PREJUDICE AND COULD NOT HAVE PREJUDICED THE COMPLAINING PARTY, THAT THE RULE THAT ERROR WITHOUT PREJUDICE IS NO GROUND FOR REVERSAL CAN HAVE EFFECT. Citing numerous authorities."

The same rule is laid down in numerous cases cited in

Pettine v. Territory of N. M., 201 Fed., page 492.

In the case of Gibboney Sand Bar Co. v. Pulaski, 24 L. R. A. (N. S.) page 1185, the only point involved on the appeal was a question of conflict in various instructions given to the jury. Counsel for plaintiff argued that there had been no prejudice by the contradiction appearing. The court stated in answer:

"In this view we cannot concur the doctrine of harmless error is seldom, if ever, applied to conflicting instructions on a material point for the all sufficient reason that the court cannot say whether the jury was guided by the correct or incorrect instructions." Citing numerous cases.

In the case of Hessler v. Calif. Hospital Co., 178 Cal. 764, the court at page 768 said:

"The court below in other instructions stated the rule by which the defendants were bound accurately and clearly. There is a clear conflict in the instructions. We are unable to determine which set of rules the jury followed."

In the case of *Pierce v. U. S. Gas and Elec Co.*, 161 Cal. 176, the court stated at page 184:

“It is clear that an instruction directing a verdict for the plaintiff in the event that the jury finds certain facts to be true must embrace all the things necessary to show the legal liability of the defendant, and to warrant the direction or conclusion contained therein that plaintiff is entitled to a verdict and such is the rule in this state. (See *Killelea v. California etc. Co.*, 140 Cal. 602.) \* \* \* It is true that other instructions were given at the request of defendant that stated the law in these respects as favorably to defendant as was warranted, if not more favorably. But the giving of these other instructions simply produced a clear conflict in the instructions given the jury by the court, and it is impossible for us to say which instructions the jury followed in arriving at a verdict in favor of plaintiff.”

In the case of *Starr v. Los Angeles Ry. Corporation*, 201 Pac. 599, the court at page 603 said:

“It is true as respondent points out that the instructions are to be construed together, but where the instructions are flatly contradictory as is the case where the jury is instructed upon a specific state of facts to bring in a verdict in favor of plaintiff or defendant, and is elsewhere instructed in general terms not to do so, the instructions must be held to be conflicting and prejudicial, because it cannot be ascertained upon what theory the verdict was returned. The theory of the plaintiff and defendant were diametrically opposed, and

the evidence, as well as the instructions, was sharply conflicting. Under this condition it cannot be said that there is no miscarriage of justice when it cannot be ascertained from the record upon what theory the jury was authorized by the instructions of the court to render its verdict, or upon what state of facts shown in the evidence the verdict was reached."

And again in the case of *Noce v. United Railroads*, the court at page 222 said:

"Where two instructions are contradictory in essential parts, the judgment must be reversed."

*Hayden v. Constantinople Mining & Dredging Co.*, 3 Cal. App. 136.

In the case of *Sappenfield v. Main St. Etc. R. R. Co.*, 91 Cal. 48, the court at page 59 says:

"The error in giving the foregoing instruction was not obviated by the instruction subsequently given at the instance of the defendant, wherein the law applicable to the case was properly presented. The jury could not determine which of the two propositions was correct. They were bound to accept all the propositions that the court instructed them upon as a correct statement of the law by which they were to be guided, and if the several instructions are inconsistent or contradictory, it is impossible to tell which was adopted by them in reaching their verdict."



This principle is supported by great weight of authority and is so uniformly followed throughout the various states in this Union that there seems to be little necessity for extending this brief to any greater length by citing or reviewing further cases.

Respectfully submitted,

HAAS & DUNNIGAN,

By H. L. DUNNIGAN,

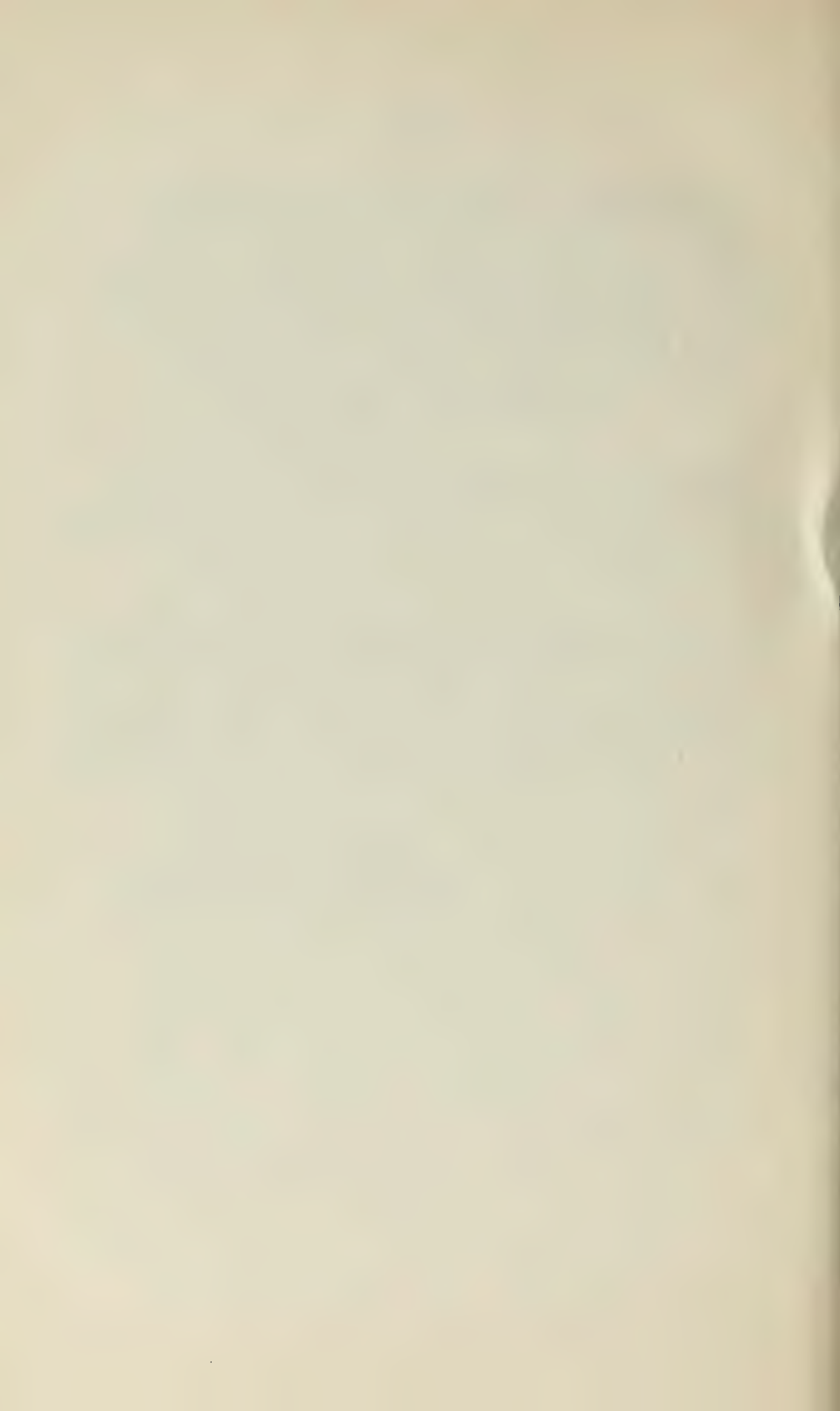
*Attorneys for Plaintiff in Error, Continental National Bank.*

The undersigned, H. L. Dunnigan, one of the counsel for the plaintiffs in error, hereby certifies that the foregoing petition for rehearing is, in his judgment, well founded in law and that it is not interposed for delay.

HAAS & DUNNIGAN,

By H. L. DUNNIGAN,

*Counsel for Plaintiff in Error.*



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IN THE  
United States  
Circuit Court of Appeals,  
FOR THE NINTH CIRCUIT.

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Continental National Bank, a Corpora-  
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*Defendant in Error.*

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ANSWER TO PETITION FOR REHEARING.

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GEORGE B. ROSS,

NEWBY & PALMER,

*Attorneys for Defendant in Error.*



IN THE  
United States  
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Continental National Bank, a Corpora-  
tion,

*Plaintiff in Error.*

*vs.*

Mary Neville,

*Defendant in Error.*

**ANSWER TO PETITION FOR REHEARING.**

The defendant in error files the following answer to the petition for rehearing in the above entitled cause:

Appellant has fallen into that error which undertakes to separate the instructions of the court into certain specific paragraphs, totally disconnected from each other and independent of each other. This is not the rule in the federal courts. Here the instructions are one body and they are delivered to the jury as an entirety. It is not permitted in the discussion of the instructions to separate them into phrases, sen-



tences or paragraphs disconnected from and independent of all other phrases, sentences and paragraphs. In order to show that such is the error of appellant, it is only necessary to call the court's attention to pages 4 and 5 of the petition for rehearing; here appellant has undertaken to designate certain portions of the instructions as paragraphs "A and B."

The decision of the court has fully dealt with and fully answered each of the propositions that is advanced by appellant as a reason for rehearing. There can be no doubt of the correctness of the decision handed down by this court, both upon authority and upon reason.

The instructions given in the case specifically told the jury that they were to consider all of the evidence given in the cause in arriving at their verdict. It would be a strange proposition if the court in the trial of a cause could not give instructions to the jury that would be applicable to the evidence as claimed by the plaintiff, and that would enable the jury to apply the law to the evidence of the plaintiff without at the same time and in the same sentence and paragraph stating, also, matters that would be applicable to the testimony of the opposing party especially where the evidence was contradictory. The instructions given in the cause were carefully framed by the court to present the law as it would be if the jury believed the testimony that was presented on behalf of the appellant.

It could not be erroneous to give the appellee the benefit of the same treatment. We are unable to discover in the instructions any contradiction whatever, as has already been said. The only contradictions in the case were in the testimony adduced and these contradictions were matters to be passed upon by the jury.

There is no error in the record. The decision of this court correctly states the law and the rehearing should be denied.

Respectfully submitted,

GEORGE B. ROSS,

NEWBY & PALMER,

*Attorneys for Defendant in Error.*











